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A
TREATISE
ON THE
LAW OF LEGACIES,

BY THE LATE
R. S. DONNISON ROPER, ESQ.

BARRISTER AT LAW, OF GRAY'S INN,

AND BY
HENRY HOPLEY WHITE, ESQ.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

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- 2.—*Where legacies to some, and none to the other executors* - - 1742

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- 4.—*Where the legacy to the executor is a contingent reversionary interest : sed qu.* - 1750

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A

TREATISE

ON

THE LAW OF LEGACIES.

CHAPTER XV.

*Of marshalling * Assets in favour of Legatees.*

WHERE a person dies, leaving assets subject to various claims, it is an object of equitable jurisdiction to make such an arrangement in the distribution of those assets, consistently with the nature of the respective claims, as shall best satisfy the just demands of all claimants: consequently it has been a rule of the Courts of Equity, in the exercise of this jurisdiction, that where one claimant has *more than one* fund to resort to, and another claimant only *one*, the former claimant shall resort to that fund upon which the latter has not any lien (*a*). Consistently with this rule, it had been long settled before the passing of the recent statute 3 & 4 Wm. 4, c. 104 (29 August, 1833), that where a *specialty* creditor, whose debt was a lien on the *real* assets, received satisfaction out of the *personal* assets, a *simple contract* creditor should stand in the place of the specialty creditor, against the *real* assets in satisfaction of his debt (*b*). The above rule still prevails in the application of the assets of a testator dying after the 29th August, 1833, in favour of his creditors by simple contract, but upon a different principle: before the above statute the real estate was made available for them through the equitable doctrine of marshalling, but now by virtue of that statute,

* The right to have assets marshalled may of course be lost by lapse of time, *Bushby v. Seymour*, 1 Jones & Lat. 527.

(*a*) *Lanoy v. Duke of Athol*, 2 Atk. 446.

(*b*) *Galton v. Hancock*, Ib. 436; *Lacum v. Mertins*, 1 Ves. sen. 312.

which makes the freehold and copyhold estate assets for the payment of the creditor by simple contract, subject to the prior claims of the creditor by specialty, the former in his own right may now resort to the real estate (c). The exercise of the equitable jurisdiction now under consideration is extended to legatees; so that if there be two legatees, and one has both the real and personal estate, and the other has only the personal estate to resort to, and that is not sufficient to satisfy both; the former legatee shall be paid out of the real estate, in order that the personal estate may be applied in satisfaction of the latter. But before legatees can claim the advantages resulting from this equitable administration, certain preliminaries are requisite: The real estate must be charged with *debts*, or with the payment of one or more *legacies*; or, where there is not any such charge, the creditor must have a *specific lien* upon the estate; or if there be not any such charge or specific lien, yet where the real estate *descends* to the *heir*, the legatees will be permitted to throw the general bond debts, and now under the above statute the simple contract debts also which are only a *general lien*, upon the realty, in exoneration of the personal estate. But where the real estate does not *descend* to the *heir*, but is *devised*, the rule is otherwise. In administering this equity, certain other subordinate rules are adopted by the Court, which it is here unnecessary to anticipate. It is therefore proposed to discuss the doctrine of marshalling Assets, so far as it respects *Legacies*, under the following heads:

SECT. I. The marshalling of assets in favour of legatees.

- 1.—*Where the real estate is devised subject to payment of debts.*
- 2.—*When subject to a charge of one or more legacies.*
- 3.—*When charged with both debts and legacies.*

SECT. II. The marshalling of assets in favour of legatees, where the real estate is *not* charged by the will with debts nor legacies, but there is a *specific lien* on the real estate. And

(c) 2 Myl. & Cr. 695; 2 Sim. & Stu. 461.

1.—*Where that real estate is devised.*

2.—*Where it descends.*

SECT. III. The marshalling of assets in favour of legatees, where the real estate is neither charged with debts nor legacies, nor subject to a specific lien, but there is *merely a general* lien on the real estate, which *descends* to the *heir*.

SECT. IV. Exception, where the estate is devised ; for where the real estate is neither charged with *debts* nor *legacies*, nor subject to a *specific lien*, but there is only a *general lien*, and the real estate is specifically devised to a stranger or to the *heir* taking as a devisee, assets are not marshalled in favour of a *general* legatee ; but the rule appears otherwise in favour of a *specific* legatee. *s. q.*

SECT. V. The extent to which equity will permit legatees to stand in the place of specialty creditors.

SECT. VI. The consideration of those legatees for whom a Court of Equity *will not* marshal assets.

1.—*Where the legatees, at the time of their legacies becoming due, have not an established claim, &c.*

2.—*Where the legacies are given to charities.*

3.—*The rule respecting contributions between charities and the next of kin, where the residue is given to charities, and part of the disposition, being within the Statute of Mortmain, fails for the benefit of the next of kin.*

4. *Where legacies given to an alien.*

SECT. VII. The mode in which *equitable* assets are distributed among legatees.

SECT. I. Assets marshalled in favour of legatees.

1st.—Where the real estate is charged with the payment of debts.

Where real estate charged with debts.

In the case of *Foster v. Cook* (c), *Henry Cook* being seised and possessed of freehold lands, leasehold and other personal estates, devised them to trustees, to pay an annuity to his wife during widowhood, and subject thereto, to and for the benefit of the child with which his wife was then pregnant (and which was afterwards still-born), with remainder to his five cousins by name, in fee, if such child died without leaving issue. The testator, among other legacies, gave the plaintiff *Foster* 100*l.*, and directed his trustees *to possess themselves of all his estates and substance*, and improve the same for the benefit of his said child, and to pay all his just debts, &c. The testator made a codicil to his will, and gave to his wife 20*l.* and another legacy; and in case of any overplus, after payment of all his just debts and legacies out of his stock and personal estates, he ordered it to be divided into two parts, and gave one moiety to his wife, and the other to the plaintiffs, over and above their legacies. The trustees filed the bill, praying, among other things, an account of the personal estate, and in case it should be insufficient to pay funeral expenses, debts, and legacies, that a sufficient sum might be raised out of the real estates to make good the deficiency. To this it was objected, that with respect to the charge of debts, there was not sufficient, in this case, to make a charge upon the real estate; it was only a discretionary power to raise out of the personalty sufficient to pay the debts; the testator clearly meant the personalty only to be liable; that there was no case, where the real estate had been devised, in which the Court had marshalled the assets. Lord *Thurlow*, C., observed, “With respect to the charge for payment of debts, he (the testator) directed the trustees to possess themselves of all his estate and substance, to pay debts; it is a most direct charge, and the legatees must come upon the real estate, so far as the personalty has been applied in payment of debts.”

In the case of *Bradford v. Foley* (d), *Tempest Hay*, after directing all his debts and funeral expenses to be paid, devised all his real estates to trustees, to the use of his son for life, remainder to his first and other sons by any future marriage in tail male, with several remainders over. The testator, after

(c) 3 Bro. C. C. 347.

(d) *Ib.* 351, note.

giving several legacies, directed the residue of his personal estate to be laid out in Government securities, in the names of his executors, to be settled and applied to the same uses as his real estates. By the decree upon the hearing of the case, the will was established; and it was, among other things, ordered, that the personal estate of the testator should be applied in payment of his debts, funeral expenses, and legacies, in a course of administration; and in case the personal estate should not be sufficient to pay his debts, funeral expenses, and legacies, it was declared that the real estate was subjected by the will to the amount of the debts and funeral expenses; that the whole or a sufficient part of the real estate should be sold, and the money applied in making good the deficiencies; and in case any of the creditors had received any thing out of the personal estate towards satisfaction of their demands, then they were not to receive any part of the money arising from the sale, till the other creditors were paid up equal with them. The estate had been sold, and the personal estate not being sufficient for payment of debts and legacies, they were ordered to be paid out of the money produced by the sale of the real estate (e).

Marshalling,
&c. where real
estate charged
with debts.

In the case of *Webster v. Alsop* (f), *John Taylor*, by his will, directed all his just debts and funeral expenses to be paid out of his personal estate; and if his personal estate should not be sufficient, he charged his real estate with so much thereof as his personal estate would not extend to pay; and then devised his real estates to trustees, subject to annuities and other payments, to the use of the plaintiff for life, with remainders over; and he gave several legacies. The personal estate proving deficient, it was declared that the legatees were entitled to stand in the place of the creditors, for so much of the personal estate as had been exhausted by them in the payment of their debts (g).

It must be here noticed, that in *Keeling v. Brown*, Sir *Richard Pepper Arden*, Master of the Rolls, refused to confine the specialty creditors of the testator to the real estate disposed of by a general residuary clause, the personal estate being sufficient to pay all the debts, but not the legacies; although the Court, from the implied charge upon the land by the will, would have marshalled the assets for the simple contract creditors, if the personal estate had been insufficient to pay their demands. In

(e) See the fourth resolution in *Haslewood v. Pope*, 3 P. Wms. 323.

(g) See *Muddle v. Fry*, 6 Mad. 270.

(f) 3 Bro. C. C. 362, (note).

Marshalling,
&c.; where real
estate charged
with debts.

that case (*h*) *Aaron Brown* began his will in these words, "*Imprimis*, I will and direct that all my just debts and funeral expenses be paid and discharged, so soon as conveniently may be, after my decease, by my executrix and executors hereinafter named. *Item*, I give, devise and bequeath to my nephew *J. Brown*, all that my messuage, &c. wherein he now lives, at *H.*, and also the sum of 400*L.*, to hold to him, his heirs, executors, administrators and assigns for ever." The testator then devised another house to his nephew *Charles* in fee, and gave another house to his wife for life, with remainder to *J. Brown* in fee: and after bequeathing specific parts of his personal estate to his wife, &c. and giving some pecuniary legacies, he gave the residue of his estate and effects, whether real or personal, to *J. Brown* absolutely, and appointed his wife, *S. Ferneough*, and *H. Hatton*, executrix and executors. The testator's personal estate being large enough to pay all the debts, but insufficient to answer the legacies, the question was, whether the assets should be so marshalled, as at least to confine the specialty creditors to the real estate in favour of the legatees? and the *Master of the Rolls* expressed a clear opinion, that there was no charge of the debts upon the real estate, but a mere direction to the executors to pay the debts, without giving them any other fund than the personal estate, out of which they could fulfil that duty. If any of the debts were to go unpaid by the insufficiency of the personal estate, he would certainly marshal the assets: making the real estate pay as much of the specialty-debts as would be necessary to obtain a fund from the personal estate for payment of the simple contract creditors: but there it was agreed on all hands, that it was not necessary for the payment of the debts of the testator to do so. Then, there being no charge upon the real estate for payment of debts, and there being an ample fund of personal estate for the payment both of specialty and simple contract debts, he was clearly of opinion in that case, there was no fund but the surplus of the personal estate, if there should be any, after payment of all the debts of the testator. He could not marshal the assets for payment of the legacies. He had formerly fully expressed his opinion upon that point, as to the difference between debts and legacies (*i*). He understood the Lord

(*h*) 5 Ves. 359; see *Mirehouse v. Scamfe*, 2 Myl. & C. 695, *infra*, 975.

(*i*) Upon this passage in the reported judgment of Lord *Alvanley*;

see the observations of Lord *Cottenham*, C. in *Mirehouse v. Scamfe*, 2 Myl. & Cr. 703, who observed, that the expression of Lord *Alvanley* re-

Chancellor expressed some doubt of it in the case of *Williams v. Chitty* (k), but, upon reflection, he (*the Master of the Rolls*) remained of the same opinion, and decreed an account of the personal estate, and of the debts, funeral expenses and legacies; and if, after payment of all the debts, there should not be enough of the personal estate to pay all the legacies, the legatees must abate in proportion. There was no other fund for their payment.

Marshalling,
&c. where real
estate charged
with debts.

2dly. Assets marshalled in favour of legatees, where the real estate is devised subject to a charge for payment of one or more legacies.

Where charged
with one or
more legacies.

In the case of *Hanby v. Roberts* (l), *W. Roberts*, by his will, gave several legacies to the defendant and others, and devised his real estates in trust for two persons who were his heirs-at-law, and who by descent would take as co-parceners; and by a codicil, he gave, over and above the legacy in his will, another legacy of 3,000*l.* to the defendant, which he directed his executors and trustees to pay; and charged all his real and personal estate whatsoever with the payment. The personal estate was exhausted in payment of the 3,000*l.* legacy; and the question was, whether the other legatees should stand in the place of the 3,000*l.* legatee, to be paid out of the real estate. Lord *Hardwicke*, C. decreed that they should. He observed, that he saw no difference between that case and one where a person, indebted by a simple contract, having lands and personal estate, begins his will by charging all his estate with payment of his debts, and then, after giving general legacies, devises his real estate by way of specific devise. The simple contract creditors exhaust the personal estate; the Court would order the general legatees to stand in their places, and come upon the real. A second question was made, whether the lands and legacies should bear the burthen in proportion to their values? but the Lord *Chancellor* decreed there was no ground for it, nor was it the intention of the testator, nor was there any case where it had been done.

The same equity is exercised in marshalling assets among legatees, where some legacies are made effectual charges upon

Among lega-
tees, where
some legacies
effectually
charged, and
others not.

ferred to the question whether the will charged legacies upon the land, and that it was well known Lord *Abney* and Lord *Rosslyn* differed as to what words would be sufficient

to charge legacies on land.

(k) 3 Ves. 551.

(l) Amb. 127. This case appears to be the same as *Hamley v. Fisher*, reported by Dickens, 104.

Marshalling,
&c. where real
estate charged
with legacies.

the real estate, and others are only charged on the personal estate.

Thus in *Masters v. Masters* (m), *Mary Masters*, by her will, after giving several general and specific legacies, devised her real estate to her nephew and heir-at-law, the defendant, charged with the payment of her legacies above mentioned, and made him executor. The testatrix afterwards added a codicil to her will, and gave other legacies, which were not charged upon the real estate. It was decreed by Sir *Joseph Jekyll*, Master of the Rolls, that the personal estate not being sufficient to pay the legacies both by the will and codicil, and the real estate being liable to the legacies by the will, and not to those by the codicil, the estate should be so marshalled, that, as far as possible, the whole will might take effect, and all the legacies be paid : and therefore, that the legatees in the will should be paid out of the real estate ; and if that should be deficient, as to the surplus, they should come in average with pecuniary legatees in the codicil, to be paid out of the personal estate ; and that, there being admitted to be a deficiency, the land should be forthwith sold to prevent a greater deficiency.

In the case of *Bligh v. The Earl of Darnley* (n), the defendant's father, the then late *Earl of Darnley*, having two sons and three daughters, gave by his will 8,000*l.* a piece to his two eldest, and 6,000*l.* to his youngest daughter, charging his real estate with the payment thereof. By a codicil, he bequeathed several general legacies of considerable value to his brothers and sisters, but without charging them upon his real estate. Subsequently to the date of the codicil, he entered into a contract before the Master, for the payment of 17,000*l.* for a third of the manor of *Cobham Hall*, in *Kent*. The Master reported him the best purchaser ; and before his death, which happened soon after, the report was absolutely confirmed. The Earl's personal estate, before his entering into the contract for this purchase of the estate, was sufficient for the payment of all his legacies ; but the performance of the contract would, as it was thought, occasion a deficiency of assets. The legatees in the codicil therefore prayed by their bill, that the assets might be marshalled, and the daughters' legacies by the will paid out of the real estate ; or if already recovered out of the personal estate, then that the plaintiffs might stand in the place of the daughters, and take so much out of the land for their legacies, as these had exhausted

(m) 1 R. Wms. 421.

(n) 2 P. Wms. 619.

out of the personal estate ; which the Court decreed as reasonable, and within the common rule of marshalling assets.

*Marshalling,
&c. where real
estate charged
with legacies.*

The same rule was adopted in the case of *Bonner v. Bonner* (o). In that case *Thomas Bonner*, by will duly executed according to the Statute of Frauds (p), gave legacies to his eldest son *Robert Bonner Warwick*, and to his daughters; and devised certain real estates to trustees for a term of one thousand years, and subject thereto, to his eldest son for life, and his first and other sons in strict settlement; and the trusts of the term were in the usual manner declared to raise and pay to his son and daughters the legacies "*hereby bequeathed to them respectively, with interest for the same as aforesaid, as also the several other legacies hereinafter bequeathed.*" By a subsequent codicil, the testator gave to three of his daughters 800*l.* each, in addition to the legacies given by his will, and he directed his codicil to be considered as part of his will. The codicil was not altered. The question upon the bill filed by two of the daughters for their legacies was, whether those given by the codicil were charged upon the real estate, the personal estate being insufficient; and Lord *Eldon*, C., said the construction he was obliged to adopt was very unfortunate; but he could not make the declaration prayed by the bill, that the legacies bequeathed by the unattested codicil were charged upon the real estate. That was not a general charge of legacies, as *Hannis v. Pacher* (q). He could only marshal the assets; as Sir *Joseph Jekyll* did in *Masters v. Masters* (r).

3rdly. The following cases are instances wherein the real estate is devised subject to a charge both with *debts and legacies*.

*Where charged
with debts and
legacies.*

In the case of *Burton v. Pierpoint* (s), Mr. *William Pierpoint*, upon his marriage with Mrs. *Darcy*, settled his real estate on himself for life, remainder to his wife for life, remainder to the first and other sons of his marriage in tail male, remainder to his own right heirs. The testator having two sons by this marriage, and having a small estate in fee-simple, unsettled, devised his wife's jewels to her, and likewise the use of the plate to her for life; after which he devised all his real estate, subject to his debts and legacies, and after his debts and legacies paid, to

(o) 13 Ves. 379.

(p) 29 Ch. 2, c. 3.

(q) Amb. 556, *supra*, 686.

(r) Last page.

(s) 2 P. Wms. 78, 81; see also *Irvin v. Ironmonger*, 2 Rus. & M. 581.

Marshalling,
&c. where real
estate charged
with debts and
legacies.

his kinsman the Marquis of *Dorchester*; and in 1706, the testator died, leaving two infant sons. At the testator's death his real and personal assets were not sufficient for the payment of his debts; his widow, therefore, gave up the jewels and plate bequeathed to her, which were applied towards the debts; but in the decree obtained for the sale of the real estate, and for an account of the personal as well as real assets, the widow's claim of her jewels and plate was saved for her. In 1719, the testator's two sons died under age and without issue, whereby the estate tail of the settled lands expired, and the reversion in fee falling in, became liable by the will to the debts. The Lord *Chancellor* said, that in the present case, as there was an express bequest of the jewels to the widow, notwithstanding that, at the time of the death of the testator, there were not assets, either real or personal, yet since afterwards, though by a remote accident, assets had happened, there could be now no inconvenience to any creditor or others; and that this legacy should be paid, and the intention of the testator performed, and the rather, for that the real and personal assets were by the will made liable to the debts and legacies; especially as it was the constant rule, that a legatee, where the real estate was made liable to pay debts, on the creditors exhausting the personal assets, should stand in the place of the creditors, and be paid out of the land; and that this was stronger in the case of a specific legacy, the principal case, which was to be preferred in payment before a pecuniary legacy. His Lordship also decreed, that all the legatees were to be paid before the residuary legatee took any thing.

In the case of *Norman v. Morrell* (t), *Sarah Long* devised her real estate, subject to an annuity, some legacies, and her debts and funeral expenses, and also subject to the debts of her late brother; and, by a subsequent codicil, gave a legacy to *Mary Norman*. The personal estate was exhausted in payment of mortgage and bond debts; *Mary Norman* filed a bill for her legacy, praying satisfaction thereof out of the testatrix's real estate, or at least to the extent of the personal estate exhausted in payment of such of her debts and legacies as should appear to have affected her real estates: and the Master of the Rolls decreed, that the assets should be marshalled.

(t) 4 Ves. 769.

SECT. II. The marshalling of assets in favour of legatees, where the real estate devised is not *charged by the will* with debts nor legacies, but there is a specific *lien* on the real estate so devised;

Marshalling, &c. where the real estate is not charged with debts nor legacies, but is subject to a specific lien.

And, first, we shall consider the cases where the *specific lien* is a mortgage.

Where the real estate devised; and the specific lien a mortgage.

In the case of *Lutkins v. Leigh* (u), *Benjamin Knight* having mortgaged his freehold lands for 2,500*l.* began his will in these words: "As touching all my worldly estate, after payment of my debts and funeral charges, which I will to be first paid (x), I give my freehold estate in *Kent* to my wife, for life, chargeable with an annuity of 30*l.* to *E. Knight* for life:" and then, after his wife's death, he gave his freehold estate, so charged, to the children of his three sisters, and directed the residue of his personal estate to be placed out at interest, his wife to have the interest for life, and, after her death, the principal to be divided among the children of his three sisters; and he gave his wife 1,500*l.*, with a proviso that the provisions in the will should be accepted by her in lieu of dower, and in satisfaction of her share in his personal estate. The question was, whether the personal estate should be applied in exoneration of the real, so as to defeat the general legatees, there not being sufficient to pay the 1,500*l.*, if the personal estate should be applied to exonerate the real? and Lord *Talbot*, C., decreed, "that the legatees must have the legacies out of the personal estate, in case the mortgagee kept to the real; and if he fell upon the personal, they had a right to stand in his room, for so much out of the real estate as he should take out of the personal, that being a proper fund for their payment."

In the case of *Forrester v. Leigh* (y), *Charles Leigh* being seised of real and personal estate, and being indebted by mortgages contracted by himself and in other mortgages contracted by the former owner on part of his real estate, from whom he purchased, and also in simple contract debts, after giving by his will several specific legacies to *Lady Barbara*, his wife, and several legacies to the plaintiff, gave his real estate to his wife, for life, remainder to *Thomas Lord Leigh*, for life, with divers remainders over. *Thomas Lord Leigh*, at his death, left the defendant Lord

(u) *Forrest*, 53.

(x) As to the interpretation of this introductory clause constituting

a charge upon the real estate, see Chap. XII. sect. II., *supra*, p. 671.

(y) *Ambl.* 171.

Marshalling,
&c. where the
real estate is
not charged
with debts nor
legacies, but,
subject to a
specific lien,
descends.

And the speci-
fic lien, a
mortgage.

Leigh, his only son. The bill was brought by the plaintiffs, for their legacies; and if the personal estate should be exhausted in payment of debts by specialty, that the plaintiffs might stand in the place of the creditors, and be paid out of the real estate. Lord *Hardwicke*, (C.), observed, there were several questions; first, whether the plaintiffs were entitled to marshal the assets generally, and to stand in the place of the specialty creditors generally. First, he should consider the question as contended; (*i. e.*) to stand in the place of bond creditors, not accompanied with mortgages, where there was a devise of land. Secondly, he should consider it where there were mortgages. As to the first, no authorities went so far; they were otherwise; and, as to the second question, respecting the mortgages, his Lordship said, "They are of two sorts, 1st, those which were contracted by the testator himself; 2d, those contracted by the former owner of the estates. The covenant for payment of those mortgages, entered into by the former owner, will not bind the personal estate of the testator. They were entered into *diverso intuitu*. The two purchasers did it to indemnify each other. The debt is apportioned on each part, and the testator covenants to pay his proportion, or to indemnify the purchaser of the other part of the estate. Where an estate descends subject to a mortgage, if no person will take an assignment of the mortgage, without the heir-at-law covenanting to pay, such covenant only subjects his personal estate collaterally. I am of opinion that the plaintiffs have a right to stand in the place of the mortgagees, to have satisfaction out of the real estate, for what they shall exhaust of the personal. A mere specialty debt is no lien upon land in the hands of the obligor, his heir or devisee. A mortgage is a lien, and an estate in the land" (z).

2. Where the
real estate, sub-
ject to a speci-
fic lien, de-
scends.

2. We observe, in the second place, that the same rule holds *à fortiori* where the estate *descends* subject to a specific lien.

This has been long a settled rule of the Court of Chancery; we find it acted upon in an anonymous case, 32d Car. 2 (a). In the case alluded to, a father, seised in fee, mortgaged the land, and gave a statute to the mortgagee to pay, &c., and by his will bequeathed 500*l.* to his daughter, and died; the mortgagee took so much of the personal estate in execution on the statute,

(z) See also *Rider v. Wager*, 2 P. Wms. 329, 335, *infra*, p. 960; *Wythe v. Henniher*, 2 Myl. & K. 636; *Johanson v. Child*, 4 Hare, 87. (a) Chan. Cases, 2d part, 4.

that there was not sufficient assets left to pay the legacy. The question was, whether, as the heir had had the mortgage discharged out of the personal estate liable to the legacy, the daughter should have relief against the heir, for the amount of her legacy; and the Chancellor observed, "where the heir is indebted by mortgage made by his father, or by other means as heir to his ancestor, the personal estate in the hands of the executors shall be employed to pay that debt in ease of the heir: but if there be not assets to pay other creditors or legatees, the heir shall not turn his charge on the personal estate; in this case here was sufficient to pay the debt by mortgage and the legacy out of the personal estate, and when both can be satisfied, both shall be satisfied: and the contrivance to make the personal estate liable to the legacy towards the satisfaction of the mortgage looks like a fraud, and shall not prejudice the legatee, but she shall have recompence against or upon the mortgage, though originally not liable to her."

Marshall, &c. where the real estate is not charged with debts nor legacies, but, subject to a *specific lien*, descends.

And the specific lien, a mortgage.

So also in the more recent case of *Lucy v. Gardiner* (b), it may be collected that the estate *descended*, though that fact is not specified. In that case a bill was filed for a legacy of 1,500*l.* given to the plaintiff *Sarah*, by the will of her father, who made the defendant, his son and heir, executor. The defendant insisted that there were not sufficient assets to pay the debts and legacies, and to shew the deficiency, said, that the testator upon his marriage with his last wife, conveyed a freehold estate, and also a term for years in the *Sun Tavern* in *Holborn*, to trustees to raise 1,500*l.* for his wife, in full of any demand which she might otherwise have, and that he had sold the term for years, and thereby raised the 1,500*l.* and paid the same to the wife, on which account the residue of the personal estate was not sufficient to pay the whole 1,500*l.* legacy. But it was decreed, by Barons *Price*, *Page*, and *Gilbert*, that the executor should not apply the term to the payment of the widow's 1,500*l.*: but that the same should go, in case of a deficiency of other personal assets, towards payment of debts and other legacies; and the 1,500*l.* given to the widow (and then paid), should remain a charge upon the freehold estate.

The preceding cases in this section illustrate also the following rule of the Court: "That, although the natural fund for the payment of debts is the personal estate; and the heir or devisee of the real is in general entitled to have the personal estate

(b) Bunb. 137.

Marshalling, &c. where real estate is not charged with debts nor legacies, but, subject to a specific lien, descends.

Heir and devisee entitled to have the personal estate applied in discharge of incumbrances on real estate; but not to defeat legatees.

applied in exoneration of incumbrances affecting the former; yet the Court of Chancery will not permit such arrangement to take place, when it would defeat legatees of their legacies." The rule is further exemplified, in the case of a general legatee, by the case of *Rider v. Wager* (c). In that case, *Admiral Littleton*, after making his will, by which he disposed of his real estate, and gave some general legacies, mortgaged the estate for 3,000*l.*; and it was contended, that this debt should be paid out of the personal estate, prior to the specific, or at least before the general legacies; and it was said to have been determined, that a mortgage should be paid out of the personal estate, in preference to the customary or orphanage part by the custom of *London*; which last was admitted by the Court, because the custom should not take place, till after payment of debts; and it was afterwards admitted by the counsel on both sides, that the land being made, by the testator himself, a fund for the payment of the mortgage money, should not be exonerated by the personal estate, so as to disappoint any of the debts or legacies, though it was entitled to such exoneration against an administrator or residuary legatee.

So also in *Oneal v. Mead* (d), the rule is exemplified in favour of a specific legatee. In that case, one seised in fee of a real estate, which he mortgaged for 500*l.* and possessed of a leasehold, devised the former to his eldest son in fee, and gave the latter to his wife, and died, leaving debts which would exhaust all his personal estate, except the leaseholds given to his wife. Upon the question, whether the leaseholds devised to the wife should be liable to discharge the mortgage, the *Master of the Rolls* decreed, that, as the testator had charged his real estate with this mortgage, and, on the other hand, specifically bequeathed the leasehold to his wife, the heir should not disappoint the legacy by laying the mortgage debt upon it, as he might have done, had it not been specifically devised; and though the mortgaged premises were also specifically given to the heir, yet he to whom they were thus devised, must take them *cum onere* as probably they were intended. That, by such construction, each devise would take effect; viz. the leasehold estate would go to the devisee thereof, and the heir would enjoy the freehold, though subject to the burthen, with which the testator in his lifetime had charged it. The *Master of the Rolls* also observed,

(c) 2 P. Wms. 329, 335; see also *Tipping v. Tipping*, 1 Ib. 729.

(d) 1 P. Wms. 693.

that that resolution did not in the least interfere with *Clifton v. Burt*, because in the latter there was no mortgage (e).

The preceding cases are instances wherein the *specific lien* was a mortgage; and it appears clearly settled, that the assets may be so marshalled, as to let the legatees come upon the mortgaged estate devised or descended in the place of the mortgagee who has been satisfied out of the personal estate. We proceed, in the next place, to a question which has excited considerable discussion, namely, whether the assets will be marshalled in favour of legatees, where the *specific lien* on the real estate is that of a vendor, in respect of purchase money due to him by the testator, who was the purchaser; or in other words, whether the legatee of the purchaser has a right to come upon the real estate for the satisfaction of his legacy, to the amount for which the personal assets have been applied in payment of the purchase money, so due by the testator to the vendor.

The authorities are conflicting, and we shall first consider those which oppose the claim of the legatees.

Coppin v. Coppin (f) determined that the legatees could not stand in the place of the vendor, with respect to his equitable lien. In that case *Francis Coppin*, the younger brother of the defendant *John Coppin*, agreed with the defendant for the purchase of an estate in *Bucks* for 4,000*l.* the purchase deeds were executed in the lifetime of *Francis*, but part of the purchase money only was paid. Afterwards *Francis* made his will, whereby, after giving several considerable legacies, he gave the residue of his land and goods to his brother *John Coppin*. The will was attested only by two witnesses. Afterwards *Francis* the purchaser died, leaving his brother *John* his heir-at-law and executor. The legatees filed their bill for their legacies. They alleged that the purchase deed was fraudulent, and according to one report (g) of the case, urged that although the will could not charge the lands, yet that the vendor had an equitable lien thereon for the purchase money remaining unpaid: Lord *King* held, that the defendant *John Coppin* had a right to retain the residue of the purchase money out of the assets. It appears that the assets would be exhausted in discharge of the purchase money. The claim of the legatees to charge the real estate in the place of the equitable lien does not by the report appear to

Marshalling, &c. where the real estate is not charged with debts nor legacies, but is subject to a *specific lien*, descends.

Where that is the vendor's lien for purchase money, &c.

(e) See *Selby v. Selby*, 4 Russ. 336, *infra*, 967; *Wythe v. Henniher*, 2 M. & K. 635.

(f) 2 P. Wms. 290.

(g) Select Cas. Ch. 28.

Marshalling,
&c. where real
estate not
charged with
debts nor lega-
cies, but sub-
ject to a spe-
cific lien, is
devised.

Vendor's lien,
&c.

have been noticed by Lord *King*. The decree however virtually determined, that the legatees could not stand in the place of *John Coppin* the vendor, in respect of his equitable *lien*.

In the case of *Pollexfen v. Moore (h)*, *Thomas Moore* agreed to purchase of the plaintiff an estate for 1,200*l.*, but died before he had paid the whole of the purchase money. *T. Moore*, by his will, after giving 800*l.* to the defendant *Mary Moore* his sister, devised the purchased estate and all his personal property to *J. Kemp*, and made him executor. *J. Kemp* committed a *devastavit* of the personal estate, and died, and the purchased estate descended upon *B. Kemp*, his son and heir. *J. Kemp* died intestate, and administration *de bonis non* of *T. Moore* was granted to *Mary Moore*. The plaintiff brought the bill against the representative of the real and personal estate of *T. Moore*, and *J. Kemp* for the remainder of the purchase money. Mrs. *Moore*, the sister and legatee of the testator, filed a cross bill, praying that if the remainder of the purchase money should be paid to the plaintiff *Pollexfen*, out of the personal estate of *T. Moore* and *J. Kemp*, she might stand in his place, and be considered as having a *lien* upon the purchased estate for her legacy. Lord *Hardwicke*, C., observed, "The vendor of this estate has a lien upon the estate he sold, for the remainder of the purchase money; for from the time of the agreement, *Moore* was a trustee as to the money for the vendor. But this equity will not extend to a third person, but is only confined to the vendor and vendee; and if the vendor should exhaust the personal assets of *Moore* and *J. Kemp*, the defendant will not be entitled to stand in his place, and to come upon the purchased estate in the possession of *J. Kemp*'s heir. But then the heir of *Kemp* shall not avail himself of the injustice of his father, who has wasted the assets of *Moore*, which should have been applied in paying the defendant's legacy. Therefore, the estate, which has descended from *J. Kemp* the executor of *T. Moore* upon *B. Kemp*, comes to him liable to the same equity as it would have been against the father, who has misapplied the personal estate; and, in order to relieve Mrs. *Moore*, I will direct *Pollexfen* to take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and will leave this last fund open, that Mrs. *Moore*, who can at most be considered as a simple contract creditor, may have a chance of being paid out of the personal assets." His Lordship decreed that the residue of the purchase

money should, in the first place (i), be paid out of the personal estate of *T. Moore*, but if it should be insufficient to pay such demand, and all his other debts, legacies and funeral expenses, or if the personal estate of *Moore* was not then sufficient, by reason that the assets of *Kemp* were not sufficient to answer such part thereof, as came to his hand, then such deficiency, so far as the personal estate of the said *T. Moore* should be applied in payment of the said purchase money, should be made good out of the purchased estate; and a competent part thereof was decreed to be sold accordingly.

Marshalling, &c. where the real estate not charged with debts nor legacies, but, subject to a specific lien, is devised.

Vendor's lien, &c.

In the preceding case Lord *Hardwicke* expressed his opinion, that the equity did not extend to a third person; but he seems to have deviated from the rule in favour of a third person on the ground of fraud. Sir *Edward Sugden*, who discusses the point under consideration in his valuable treatise on the Law of Vendors and Purchasers (j), ingeniously suggests, that Lord *Hardwicke's* decision in *Pollexfen v. Moore*, was made on the ground that, as *Pollexfen* had not delivered the title deeds, but had by agreement kept them as a security for the purchase money, it must be considered as an equitable mortgage, and hence that the dictum and determination were not at variance; but Lord *Hardwicke* seems from the decision, as reported, to have proceeded exclusively on the ground of fraud in *J. Kemp*.

The authorities, in favour of the legatee's right to have the assets marshalled, remain to be considered.

The case of *Austen v. Halsey* (k), bears upon the subject, though that case was decided upon the general construction of the will. In that case, *Robert Austen*, by his will, gave legacies to his daughters and others, and then devised and bequeathed his freehold, copyhold, leasehold, and other personal estates to trustees, absolutely, upon trust to convey and assign the same to his son *Henry Edward Austen* absolutely, when he attained twenty-one, or married before with consent; but in case he married before twenty-one without consent, the trustees were to settle the freehold and copyhold estates upon his son and his issue in strict settlement, with several remainders over; and also to assign the leasehold and other personal estates, and the savings and accumulations thereof, after payment of debts and legacies, to his daughters equally. By a codicil, dated 1st of November 1797,

(i) As corrected by Sir *Edward Sugden* from the Register's book, Vend. & Pur.

(j) Sug. Vend. & Pur. 872, &c., 11 ed. 1846.

(k) 6 Ves. 475.

Marshalling,
&c. where the
real estate
not charged
with debts, nor
legacies, but,
subject to a
specific lien, is
devised.

Vendor's lien,
&c.

duly executed according to the statute (*k*), the testator stated that the trustees of a certain estate called *Titings*, had proposed to sell it to him, and in case of his death before the completion of the contract, he directed his trustees to complete the same, and settle the estate to the uses in the will directed of his other estates; and he gave them a power to apply the personal estate to that purpose. On the 2nd of *November*, the testator executed the contract for the purchase of the *Titings* estate for 7,000*L*. exclusively of the timber which was to be taken at a valuation, and he died on the day following. The trustees completed the purchase out of the personal estate which was thereby exhausted. The daughters filed their bill against the brother and the trustees for their legacies; praying, among other things, that the purchase of the estate called *Titings* might be completed, the purchase money paid out of the testator's leasehold and personal estates specifically bequeathed, and not from the other personal estate, in order that the personal estate might be applied in payment of the legacies. Upon the first question, whether the bulk of the real estate was charged with the legacies? Lord *Eldon*, C., decided in the negative: and upon the second question, whether the purchased estate might by circuitry be made answerable to the legacies? His Lordship said, "*Pollexfen v. Moore* is the only case cited; but, without that authority, I consider it clearly settled, that the vendor has a lien for the purchase money, while the estate is in the hands of the vendee: I except the case, where upon the contract, evidently that lien by implication was not intended to be reserved. That is, in equity, very like a charge, and the cases of marshalling seem to have gone this length, that where there is a charge upon an estate descended, a legatee shall stand in the place of the person having that charge, resorting to the personal estate; and I do not think a power to apply the personal estate, which is all that is given by this codicil, amounts to a command, leaving no discretion to the trustees. There is a difficulty here from the circumstance, that the estate purchased has not *descended*, but is *devised*; and there is a difference in marshalling as to that. In this instance it is devised to the heir with many remainders over. It may be found difficult for the legatees by means of this circuitry to find a fund for payment."

In the case of *Trimmer v. Bayne* (*l*), the question, whether the vendor's lien was within the common principle of marshalling

(*k*) 29 Car. 2, c. 10.

(*l*) 9 Ves. 209.

assets, came before Sir *William Grant*, and called for a decision. In that case, a claim of *Alexander Bayne*, the heir-at-law of the testator, had been ascertained by the *Master's* report to amount to 3,630*l.* and a fraction (*m*), in respect of specialty and simple contract debts, and the purchase money of real estates contracted for by the testator before his death, by writing not under seal, paid out of the money produced by sale of the testator's real estate. The deposit money only had been paid by the testator. The cause came on for further directions, and upon a petition by the *heir*, the principal question was, upon his claim to be reimbursed his payments out of the real fund on account of the purchase money of the estates contracted for by the testator. The case of *Coppin v. Coppin* was not cited, but for the heir it was contended, that there was no decision against the *dictum* of Lord *Hardwicke* in *Pollexfen v. Moore*. The *Master of the Rolls* observed, in reference to that case, "this is a very obscure report, and it has perplexed me very much formerly; the decision is directly against the *dictum* of Lord *Hardwicke*. This cannot be distinguished from the common case of marshalling; that a person having two funds shall not by his choice disappoint another having only one, the consequence is the heir-at-law has no claim."

Marshalling, &c. where the real estate not charged with debts nor legacies, but, subject to a *specific lien*, is devised.

Vendor's lien, &c.

From a note of this case (*n*) in the report of *Selby v. Selby*, it appears that it was referred to the Master (among other things) to compute interest on the legacies, and that what should be found due to the legatees should be paid out of the funds standing to the account of the personal estate; but in case the fund should not be sufficient to pay them all in full, then the fund was to be *apportioned among them rateably*. It would therefore seem the heir was contending with the legatees.

The above case of *Trimmer v. Bayne*, amounts to a decision that as against the *heir* (*o*), the pecuniary legatees were entitled to have the assets marshalled in respect of the vendor's lien: but until the recent decision of *Wythe v. Henniker* (*p*), no case appears to have expressly determined that, as against the *devisee* of the purchased estate, the pecuniary legatees are not entitled to have the assets marshalled in respect of the vendor's lien; and the point was considered not free from doubt and difficulty. The

(*m*) See the reporter's note to *Selby v. Selby*, p. 339.

(*n*) See *Selby v. Selby*, 4 Russ. 339, note, the order taken from Reg.

Lib. and p. 340, per Sir *John Leach*, M. R.

(*o*) See also *Sproule v. Prior*, 8 Sim. 189.

(*p*) 2 M. & K. 635, *infra*, p. 967.

Marshalling,
&c. where the
real estate
not charged by
the will with
debts, &c. but,
subject to a
specific lien, is
devised.

dictum of Lord Eldon, in *Austen v. Halsey* (q), seems opposed to the right of the legatees against the devisee.

In the case of *Headley v. Readhead* (qq), the principle of marshalling seems to have been admitted in favour of the legatees, but (it is presumed from the expressions in the will, intimating in that case an intention on the part of the testator equally favourable to the devisees and legatees), it was considered by the *Master of the Rolls* a case of rateable contribution. By the report of that case, the general effect only of the will is thus stated; “*William Readhead* by his will, reciting that he had contracted for the purchase of an estate, directed his executors to pay the purchase money for the same, and he devised the estate to his natural son, the defendant, and he also gave several legacies and annuities to the other defendants: the personal estate was deficient on account of certain *Scotch* leaseholds, not passing by the will, which, according to the *Scotch* law, was not for that purpose formally executed. The Master found the personal estate was about sufficient to pay either the purchase money due, or the legacies and annuities, but *not both*. The direction to the executors manifests a clear intention, in this case, that the devisee should take the devised estate, clear of the lien; and so far it seemed a strong authority in favour of the legatees.

In the case of *Mackreth v. Symmons* (r), the following observations of Lord Eldon occur: “I have some doubt upon another point; taking the vendor to have the *lien*, whether the Court will in the case of the death of the vendee marshal the assets, so as to throw the *lien* upon the purchased estate. It has often been said, and the case of *Coppin v. Coppin* stated as an authority, that the Court will not do that.” The Lord Chancellor in his judgment takes no notice of that point. In that case the vendor happened to be the heir of the vendee; so that the estate was at home: and it was held, that, being also the executor, he was entitled to retain the purchase money out of the personal assets. That the decision requires a good deal of consideration. If the estate had been in a third person, the general doctrine as to a person having two funds to resort to, might be thought to have an immediate application; and the express terms of the decree in *Pollexfen v. Moore*, might be found very inconsistent with it. In giving judgment upon a subsequent day, his Lordship discussed the cases on the doctrine of the vendor’s *lien*, and observed, “the next case is *Coppin v. Coppin*, where the doctrine of *Pol-*

(q) *Supra*, p. 964.

(qq) Cooper, R. 50.

(r) 15 Ves. 329.

Ilexen v. Moore, as to marshalling, was, practically, though I doubt whether it ought to have been admitted;" and in alluding to Lord *Hardwicke's dictum*, that this equity would not extend to a third person, Lord *Eldon* continues, "If that is to be understood, that this equity would not extend to a third person, who had notice, that the money was not paid, Lord *Hardwicke's* subsequent decisions contradict that: if the meaning is that he would follow the case of *Coppin v. Coppin*, and that, if the vendor exhausted the personal assets, the legatee of the purchaser should not come upon the estate, there is great difficulty in applying the principle; as it would then be in the power of the vendor to administer the assets as he pleases; having a lien upon the real estate to exhaust the personal assets, and disappoint all the creditors; who, if he had resorted to his lien, would have been satisfied; and in that respect, with reference to the principle, the case is anomalous."

Marshalling.
&c. where the
real estate
not charged by
the will with
debts, &c. but,
subject to a
specific lien, is
devised.

The case of *Selby v. Selby* (s), decided that, as according to the general rule of marshalling assets, simple contract creditors are as against a devisee entitled to stand in the place of specialty creditors who have exhausted the personal estate, because the specialty creditors had the two funds of real and personal estate to resort to, so the simple contract creditors in that case were entitled to stand in the place of the vendor against the devisees; for the vendor had equally a charge upon the double fund of real and personal estate. But with respect to the right of legatees, Sir *John Leach*, M. R., observed, if the charge of the vendor is to be considered in the same manner as if it were secured by mortgage, then a pecuniary legatee would have the same benefit from the vendor's lien: it being now the settled law of the Court, that, if the real estate devised be subject to a mortgage, and the mortgagee exhaust the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate. The present case, however, does not call for a decision upon that point.

The point however has since been determined against the general legatee in the case of *Wythe v. Henniker* (t), before mentioned. In that case the testator devised his *Newton Hall* estate, lately purchased by him of Lord *Maynard*, to his eldest son for life, with several remainders over: and, after stating that he had charged his *Newton Hall* estate with 6,000*l.* by mortgage, directed that if that sum were unpaid at his death, it should be paid out of his personal

(s) 4 Russ. 337.

(t) 2 M. & K. 635.

Marshalling,
&c. where the
real estate
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cific lien is
devised.

estate, or the money produced by sale of other real estate which he devised to be sold. After giving some specific and general legacies the testator gave the residue of his real and personal estate (subject as aforesaid, and also subject to the payment of his debts), to trustees to convert into money, and thereout pay his debts and testamentary expenses, and, subject thereto, to his children equally. By codicil the testator directed that in order to make a better provision for his younger children, the 6,000*l.* should remain a charge upon his *Newton Hall* estate, and be paid thereout agreeable to the mortgage, and not out of his personal estate, or out of the sale of his other estates by his will directed to be sold: and he directed that the money to be produced by sale of his estates should be divided amongst his younger children. Part of the purchase money for the estate purchased by the testator remained undischarged at the time of his death. One of the questions was, whether the personal estate was applicable to the satisfaction of the mortgage directed to be paid out of the produce of the sale of the real estate; and if so, whether the general legatees were entitled to stand in the place of the mortgagees to the extent to which the personal estate was applied in discharge of the mortgages: and further, whether the general legatees were entitled also to stand in the place of Lord *Maynard*, in respect of the lien which he had on the estate sold by him, so far as the purchase money had been paid out of the personal estate. Sir *John Leach*, M. R., observed the devise of the estates to be sold for the payment of the mortgages, was in effect, a gift of those estates to the younger children, subject to the mortgages; and the gift of an estate subject to a mortgage does not deprive the devisee of the right to satisfaction of the mortgage out of the personal estate: there was no intention to exonerate the personal estate from the payment of the mortgages, the residue of the estate being given after payment of debts; and that it was plain the testator intended the produce of the real estate as an auxiliary fund only. His Honor following the rule settled by *Forrester v. Leigh* (u), decided that the general legatees were entitled to stand in the place of the mortgages upon the devised estate, to the extent to which the mortgages had been paid out of the personal estate: and in reference to the vendor's lien, after expressing his disapprobation of the case of *Pollexfen v. Moore* (v), his Honor decided that the pecuniary legatees had no right to stand in the place of Lord

(u) *Ubi supra*, p. 957.

(v) *Ubi supra*, 962.

Maynard in respect of his lien upon the estate purchased by the testator.

In *Sproule v. Prior* (w), the testator after making his will, agreed to purchase an estate in *Gloucestershire*, and died, leaving the greater part of the purchase money unpaid, and on his death the estate descended to his heir-at-law. Sir *L. Shadwell*, V. C., decided that the lien which the vendor had for the purchase money, subjected the testator's assets to be marshalled at the suit of a legatee. His Honor said, "my decision, I admit, is contrary to the decision in *Coppin v. Coppin*, and to the *dictum* in *Pollexfen v. Moore*. But I must say of them, as Lord *Eldon* in *Aldrich v. Cooper* said of *Robinson v. Tonge*, they are not reconcileable with the general class of cases, and, besides that, they have been positively overruled."

Marshalling, &c. where the real estate is not charged with debts, &c. but subject to a general lien descends.

SECT. III. The marshalling of assets in favour of legatees, where the real estate is neither charged with debts nor legacies, nor subject to a specific lien, but there is *merely a general lien* on the real estate, which *descends* to the heir.

The next rule is, that assets are marshalled in favour of legatees, where the real estate is neither charged with debts nor legacies, nor subject to any *specific lien*, but there is a *general lien* and the estate *descends to the heir*. This rule was stated by Lord *Hardwicke*, in *Hanby v. Roberts* (x), thus; if there be debts by specialty and legacies, and no *devise* of the real estate, but it *descends*, if the creditors exhaust the personal estate, the legatees may stand in their place, and come upon the real estate: This is against an *heir-at-law*. In the case of *Aldrich v. Cooper* (y), Lord *Eldon* observes, "In the cases of legatees, against assets *descended*, a legatee has not so strong a claim to this species of equity as a creditor; but the mere bounty of the testator enables the legatee to call for this species of marshalling; that, if those creditors, having a right to go to the real estate *descended*, will go to the personal estate, the choice of the creditors shall not determine, whether the legatees shall be paid or not" (z).

Marshalling, &c. where the real estate is not charged with debts, &c. but, subject to a general lien, descends.

The rule was admitted in the case of *Scott v. Scott* (a). There *Scott* devised to *Henry* his eldest and only son by a former wife,

(w) 8 Sim. 189.

(x) Amb. 127.

(y) 8 Ves. 396.

(z) See also *Herne v. Meyrick*, 1 P. Wms. 202.

(a) Amb. 383.

Marshalling,
&c. where real
estate is not
charged, &c.
but *descends*
subject only to
a *general lien*.

and to his heirs and assigns, all other his real estate not before devised; nevertheless, in case he should die without issue, not having attained twenty-one, then immediately after his death under age and without issue, unto the testator's son *William* and the heirs male of his body, with remainders over. The eldest son attained twenty-one. The specialty creditors, not having a lien on the estate, having exhausted the personal estate in satisfaction of their demands, the legatees contended to stand in their place, and come upon the real estate. The question was, whether the eldest son took by *devise* or *descent* (*b*); in the latter case, the legatees would be entitled, in the former, not: and the Lord Keeper *Henley*, after having taken time to consider the point, gave his opinion, that the eldest son took by *devise*, as having under the will a different estate from that which would have descended to him; the one being pure and absolute, the other not.

SECT. IV. Exception, where the estate is devised.

Marshalling,
&c. not allowed
when the estate
is not charged,
&c. but, subject
only to a *gene-
ral lien*, is
devised.

But where the estate is neither charged with debts nor legacies, nor subject to any *specific* lien, but there is only a *general* lien on the estate, and the estate does not *descend* to the heir, but is *devised* to a stranger, or to the heir taking as a devisee, the assets are *not* marshalled at least in favour of *general* legatees, so as to throw the general bond creditors upon the real estate. The reason is, that the will affords evidence of as strong an inclination on the part of the testator in favour of a specific devisee, as of a general legatee.

Thus, in the case of *Clifton v. Burt* (*c*), *John Bignold* devised all his estate in *Morrow* and *Stoke* to his son *John Bignold* in tail, remainder to *Joseph Burt* in fee. He also devised his *copyhold* estates, which he *had* before surrendered to the use of his will, to his said son *J. Bignold* in tail, remainder to the defendants *Joseph Burt*, *James Burt*, and *Elizabeth Horsnaile*, and their heirs, (subject to the annuity therein mentioned), to the intent to sell the copyhold, and to apply the money to make good his debts and legacies, and he devised the residue to *Joseph Burt*, *James Burt*, and *Elizabeth Horsnaile*, equally. The testator further devised to the plaintiff, 500*l.* within three months after the death of the testator's son, if he died under age and unmarried,

(*b*) See *Chaplin v. Leroux*, 5 Maul. & S. 14, and *Biederman v. Seymour*, 3 Beav. 368.

(*c*) 1 P. Wms. 678, and see *Galton v. Hancock*, 2 Atk. 436, 437.

in which case he directed that all his personal estate, beyond what would pay his debts and funeral expenses, and the 500*l.* and the other legacies given by his will, should be equally divided among *Joseph Burt, &c.*, and he appointed the plaintiff and two other persons executors. The son died under twenty-one; Lord *Harcourt* decreed, that the rents of the real estate, together with the personalty, should be applied in payment of debts and legacies; but in case of deficiency, and if it appeared that any of the specialty creditors had been paid out of the personal estate, then the simple contract creditors and legatees were to stand in their place, and have satisfaction out of the real estate, so far as the personal estate had been applied in payment of such debts, in equal proportion. Upon an appeal from this judgment, Lord Chancellor *Parker* reversed so much of the decree, as directed a sale of the *freehold* estate for the satisfaction of the legacy of 500*l.*, and observed; First, that although equity will marshal assets in favour of a legatee, as well as of a simple contract creditor, yet every *devisee* of land is as a specific legatee, and should not be broken in upon, or made to contribute towards a *pecuniary* legacy. Secondly, that it was a rule, that if one give a specific legacy of a horse or diamond, and also a pecuniary legacy of 500*l.* to *B.* and there were not assets to pay both, still the specific legatee should be preferred, and have his whole legacy; for were the executor to make him contribute towards the pecuniary legacy, this would be, *pro tanto*, to make such specific legatee buy his legacy, against the manifest intention of the testator. Thirdly, that if a specific personal legatee should not contribute towards a pecuniary legacy, much less should a specific devisee of land. Fourthly, that if in the principal case the testator had devised the 500*l.* to *A.* and a term of five hundred years to *B.*, without leaving assets to pay the 500*l.*, still the specific legatee of the lease ought to prevail, without contributing towards the pecuniary legacy, and if such pecuniary legatee should not break in upon a specific legatee of a term, *à fortiori*, he should not disappoint the will as to a devise in fee, which was to be favoured more than the devise of a term, in regard it was with more difficulty that a Court of Equity, in any case broke in upon, or charged, the real estate.

Marshall, &c. where real estate not charged, but, subject to a general lien, is devised.

We here observe that the 3 & 4 Wm. 4, c. 106, sect. 3, enacts, that where land is devised by a testator, dying after the 31st of *December* 1833, to his heir, such heir shall be considered to have acquired the land as a devisee. In *Strickland v. Strickland* (*d*),

Marshalling,
&c. where the
real estate is
not charged,
but, subject to a
general lien, is
devised in fa-
vour of general
legatee.

Sir *L. Shadwell*, V. C., decided that, under the above act, the heir to whom lands are devised takes as devisee for all purposes, and accordingly, that *general* legatees will not be entitled to have assets marshalled as against such heir.

In the preceding edition of this work, a reference was made in this place to the rule, that real and personal assets specifically devised and bequeathed, must, upon failure of the general personal estate, contribute in proportion to their respective value to the payment of a specialty debt; but that with respect to a simple contract debt, the specific legatee of personal estate could not call upon the specific devisee of real estate for such contribution, as the personal estate was the only fund then liable to his debt: the law, however, has since been altered; and by the 3 & 4 Wm. 4, c. 104, sect. 3, the real estate of a testator is made assets for the payment of his simple contract debts; and it would seem that a specific legatee within the operation of the act, would be entitled to contribution from the specific devisee for the payment of a simple contract creditor.

The case of *Long v. Short* (e), was cited in the former edition, as establishing the rule for contribution between the specific devisee and legatee in regard to a specialty debt, and is referred to in a former page (f).

In that case, *David Long*, seised in fee of some lands, and possessed of a lease for years in other lands, and being indebted by specialty and simple contract, devised a rent-charge of 40*l.* a year, out of the lease for years to one grandson, the lease itself to another grandson, and *all* his land in fee to the plaintiff and his family in strict settlement. None of the devisees were the testator's heir, and the will was made since the statute for relief of creditors against fraudulent devises (g). There being a deficiency of assets to pay debts, the question was, whether they should be charged on the freehold or the leasehold estate? And it was decreed by Lord *Cowper*, C., *First*, That the devise of a rent-charge out of a term, was as much a specific devise, as if it had been of the term itself. *Secondly*, That the devise of a term for years was as much a specific devise as a devise of land in fee; wherefore each being equally specific devises, it would, in this case, be an equal disappointment of the testator's intention to defeat either, by subjecting it to the testator's debts. *Thirdly*, That since the statute of Fraudulent Devises, lands in fee were

(e) 1 P. Wms. 403.

(f) Page 359.

(g) 3 Wm. & Mary, ch. 14.

equally subject to debts by specialty in the hands of the devisee, as leases in the hands of the executor or legatee were to debts by simple contract at common law; so that, to prevent the disappointment of the testator's intention, the Court thought it reasonable, that the devisee of the fee simple estate, and the devisees of the lease and annuity, should respectively *contribute* to the debts by specialty, in proportion to the value of the premises; but that as to the debts by simple contract, if there should not be enough besides to pay them, they should fall upon the leasehold premises only. It was objected, that the fee simple lands ought to be more favoured than any of the personal estate and leases, for that the latter had always been decreed to go in aid of the former, and therefore, in this case, the leasehold estate ought to bear all the debts by specialty, as far as it would extend. But this objection was overruled by the Lord *Chancellor*, for that it might utterly disappoint the testator's intention in providing for his grandsons out of the lease; though his Lordship allowed, that if the devise had been to *B.* of all the *rest* of the testator's lands, it would have been a residuary, not a specific devise, and the devisee should not have come in till after the debts by specialty or otherwise had been paid out of his inheritance.

Marshalling,
&c. where the
real estate is
not charged,
but, subject to
a general lien,
is devised.

Qy. in favour
of a specific
legatee.

The fifth resolution in *Haslewood v. Pope* (*h*), may probably at first sight be considered at variance with the case last cited. That resolution was in these words: "Where a man dies indebted by bond and leaves a personal estate, and devises lands to *J. S.* in fee, and gives specific legacies, and the creditor by bond comes on the personal estate to be paid his bond; the specific legatees shall not stand in the place of the bond creditor, to charge the land devised, because the devisee of the land is as much a specific devisee as the legatee of the specific legacy." It is presumed that Lord *Talbot*, in the expression "the specific legatees shall not stand in the place of the bond creditors to charge the land devised," must have intended, not that the devisee should not *contribute*, but that the specific legatee had no right to have the assets marshalled against the specific devisee, so as to throw the bond debt exclusively upon the real estate devised, to the exoneration of the personalty specifically bequeathed. In this qualified sense the resolution in question and the case of *Long v. Short* probably may be reconciled (*i*): but as the subject has been discussed in a former page and the recent

(h) 3 P. Wms. 322.

(i) See 12 Sim. 301.

Marshalling,
&c. not allowed
in favour of
general legatees
as against
general devisees.

authorities there cited, the reader is referred to that part of the present work (j).

We here observe, that equity will not marshal the assets in favour of the general legatee as against a general devisee. This was decided in the case of *Mirehouse v. Scaife* (k). There the testator, after giving several general legacies, devised a certain field to his grandson, and then added the following words,—“It is my will that all my debts and all the above legacies be paid and discharged within six months after my decease; and all the rest and residue of my estate both real and personal, lands, messuages and tenements I give to *Mary Newton*, by her freely to be possessed at my decease: the testator appointed *Brockbank* and *Scaife* executors. The personal estate not being sufficient for the payment of debts and legacies, two of the legatees filed their bill against the executors and the residuary devisee, praying a declaration, that the debts and legacies were a charge upon the residuary real estate; and that, if the personal estate was insufficient to pay debts and legacies, the deficiency might be raised by a sale of a competent part of the real estate; but if the Court was of opinion that the real estate was not so charged, then that the assets might be marshalled, and the amount of the personal estate applied in payment of the debts; or that so much as should be sufficient for payment of the legacies, might be raised out of the real estate, and applied in payment of the legacies. To this bill the residuary devisee and her husband filed a general demurrer, which was dismissed by Sir *L. Shadwell*, V. C., on the ground, that the assets might be marshalled in favour of the general legatees, as against the residuary devisee, being of opinion that the will did not charge debts upon the real estate. Lord *Cottenham*, C., upon appeal, confirmed the dismissal of the demurrer, but for reasons the reverse of those given by the Vice Chancellor, being of opinion, after a careful examination of the authorities, that the assets could not be marshalled in favour of the general legatee as against a general devisee; but that, upon the true construction of the will, the testator had charged all his residuary real estate with the payment both of debts and legacies; so that the legatees had, in their own right under the will, a title to have their legacies paid out of the residuary real estate, the personal estate being deficient, so as thereby to exclude the question of marshalling.

In reference to the preceding sections, we notice the Statute 3 & 4 Wm. 4, c. 104, which enacts that where any person

(j) Page 359, &c.

(k) 2 Myl. & C. 695.

dies seised of any real estate, whether corporeal or incorporeal, freehold, customary, or copyhold, which he shall not have devised subject to the payment of his debts, the same shall be assets to be administered in equity for the payment of the debts of the deceased, whether due on simple contract or on specialty; but creditors by specialty in which the heir is bound, are to be paid in full before any of the creditors by simple contract or by specialty in which the heirs are not bound.

Marshalling,
&c. to what
extent legatees
may stand in
place of spe-
cialty creditors.

In the case of *Mirehouse v. Scaife* (l), the counsel for the appellants urged that, as the will was made since the above statute, the testator must be presumed to be cognisant of the law, and to know that his debts were chargeable on his real estate, and, therefore, that he meant that if the personal estate was insufficient to pay both debts and legacies, the former should be thrown upon the real estate; but Lord *Cottenham*, C., observed, that he could not feel justified in departing from the rules established in the cases which preceded the statute, on account of its very beneficial provisions. To do so would create great confusion, and much uncertainty and litigation (m), and the provisions of that act could have no bearing upon the construction of a charge of legacies; and indeed, as to debts, a charge by the will was now inoperative in consequence of the act.

SECT. V. The extent to which equity will permit legatees to stand in the place of specialty creditors.

Having considered, in the preceding sections, in what cases equity will and will not marshal assets in favour of legatees, as between them and creditors; we proceed to inquire, to what extent it will permit the legatees to stand in the place of such creditors, in those cases, where the assets are thus marshalled. The rule of the Court is, that legatees shall not be entitled to any greater privilege or advantage than the creditors themselves would be entitled to, from the amount of their debts. The subject has been in a manner anticipated in the preceding sections, and sufficient cases have been adduced to show, that the legatees are entitled to resort to the real estate, only to the amount of the debt or lien upon the real estate, in discharge of which the personal estate may have been previously applied. It may be remarked, that if a creditor could not, under his contract, affect the real assets in the hands of the heir or devisee, with the payment of his debt, a legatee who merely stood in his place,

(l) *Ubi supra.*

(m) *Horn v. Horn*, 2 Sim. & Stu. 451.

Marshalling,
&c. to what
extent legatees
may stand in
place of spe-
cialty creditors.

and upon the same terms, could not be in a better situation. This, previously to the 3 & 4 Wm. 4, c. 104, was the case with all debts by simple contract, or by *specialty*, where the heir was not expressly bound by the contract; and, if so with them, legatees were in the same predicament.

The case of *Lacam v. Mertins* (n) illustrated this rule with respect to a simple contract creditor, and might therefore be applied to the case of a legatee. In that case Mrs. Hay, in the life of her husband, levied a fine of her estate, making it subject to a debt of 2,000*l.* which had been contracted by her husband. After his death she borrowed a further sum of 400*l.*, and by an indorsement agreed, that the estate so pledged should stand charged with this 400*l.* and not be redeemed without payment of all these sums. The question was, how far simple contract creditors were entitled to come upon her real estate, in the place of specialty creditors: and by Lord Hardwicke, C., it was observed, "The rule of the Court, as to marshalling assets, and directing simple contract creditors to stand in the place of specialty creditors, *pro tanto*, to receive satisfaction, is a very just and beneficial rule, and ought to be adhered to; and the Court leans and endeavours to bring creditors within that rule, and extends it that all the creditors may receive satisfaction: yet it must be as between the real and personal assets of a person deceased; for the Court has no right to marshal the assets of a person alive; it not being subject to such a jurisdiction of equity till the death. Nor can the Court extend this relief to creditors, further than the nature of the contract will support it; therefore it must be a specialty creditor of the person whose assets are in question, such as might have remedy against both the real and personal estate, or either, of the debtor deceased: it not being every specialty creditor, in whose place the simple contract creditors can come to affect the real assets; viz. where the specialty creditor himself cannot affect the assets as where the heirs are not bound; and such it is here; heirs not being bound in the covenant. Now to apply these general rules to the debts in question: for such debts, upon which there might be remedy against her in her life, or against her representative after her death, the simple contract creditors are entitled to receive satisfaction, *pro tanto*; and therefore, for the 400*l.* as being a specialty debt upon her own bond, after the husband's death, satisfied out of her personal assets; but not as to the 2,000*l.*, which there is no ground to make her personal debt, or any debt of hers. It was

(n) 1 Ves. sen. 312.

originally her husband's, nor could she then make herself liable by contract. There is no covenant for her payment of the money, nor is there such a covenant, upon which any remedy could lie against her personal estate, unless she had been guilty of a breach; all the covenant being, that the estate should stand charged. This covenantee, therefore, could not have brought an action, or other remedy, against her or her representative, because no breach. Then there is nobody, in whose place to come *pro tanto*; and this is a case for which the Court never would strain, however liberal they are in such cases, in the construction for creditors; for it is material in this case, that it is the husband's debt, and the intent was, not to change the nature of it, and to make it her debt, for it is only recited in the deed, and the recital of a debt under hand and seal has been held to be no specialty debt, for it must stand upon its own force; and so I have known it determined by Sir *Joseph Jekyll*."

Marshalling,
&c. to what
extent legatees
may stand in
place of spe-
cialty creditors.

But now by the above statute the simple contract creditor has, subject to the priorities of specialty creditors, a lien upon the real estate; if, therefore, he exhausts the personalty in payment of his debt, the legatee may now, to that extent, stand in his place, and resort to the realty, as before the act, the legatee might under similar circumstances, where the specialty creditor had absorbed the personal estate.

It may be properly noticed in this place, that, in instances where there is not any deficiency of assets, if a creditor apply the subject of a specific bequest in satisfaction of his debt, the executor or residuary legatee will be obliged to make the specific legatee a recompence out of the general assets, as they can retain nothing to their own use, but the residue, after debts and legacies paid.

Thus, in the case of *Bowman v. Reeve* (o), the testator being seized and possessed of a considerable estate in *Holland*, consisting of houses, goods, merchandizes, jewels, and other effects, and being a native of that country, and residing there, sent for a notary public to make his will, and, according to the custom of the country, an instrument was drawn up in the nature of a will, and executed, whereby the testator gave some of the houses to the minister of the Presbyterian meeting there, and others to the minister of the Reformed Church there; and then gave all the residue of his goods, chattels, plate, jewels, and other effects, (which were very particularly enumerated), to the defendant, whom he made universal heir and executor, and died possessed

(o) Pre. Ch. 577, see also *Mirehouse v. Scaife*, 2 Myl. & C. 696.

Marshalling,
&c. to what ex-
tent legatees
may stand in
the place of
creditors.

of a very considerable personal estate in *England*, besides what he had in *Holland*. By the laws of *Holland*, there is no distinction between the real and personal estate, but both are equally liable to the satisfaction of creditors; and therefore, after the testator's death, his creditors in *Holland* took possession of the houses specifically devised, in satisfaction of their debts; and though there were other considerable effects in *Holland*, yet the residuary devisee and executor would not intermeddle therewith; because, if he did so, by the law of that country he must take upon him the payment of all the testator's debts, notwithstanding a deficiency of assets; but he proved the will in *England*, and possessed all the testator's estate and effects here, upon which the plaintiffs, who were devisees of the houses in *Holland*, brought the bill against the executor, and residuary legatee, to have a recompence in proportion to the value of the houses. The *Chancellor* decreed an account and satisfaction accordingly; although it was urged, that those houses, by the law of this country, were liable to the payment of debts, and therefore, the specific devisees ought to take them liable thereto, and that the testator never intended to give them otherwise, or to give them any other part of his estate: and his Lordship also said, that there was no difference between a devise of these houses, and a devise of a house or a term for years, and that in those cases, if the creditors brought an action, or sued out execution upon a judgment against the executors, and took the house or term for years, in execution, which they might do, notwithstanding the specific devise thereof, yet, most certainly, the executor or residuary legatee, should be obliged in equity to make them a recompence; for they were to have nothing to their own use but the residue, after the debts and legacies paid, and the *residuum* was chargeable with the debts; though, as to the creditors, they might take what they thought fit in satisfaction of their debts, and the enumerating of particulars in this devise of the *residuum*, made it no more a specific devise, than if he had only said, in general, all the rest of his goods and chattels, or such like words; and therefore this *residuum* was liable to the payment of debts, although the creditors thought fit to fix on other parts of his estate, and thereby deprive the specific legatee of what was intended him.

SECT. VI. The consideration of those legatees for whom a Court of Equity *will not* marshal assets.

We proceed to inquire what legatees they are for whom equity *will not* marshal assets.

Legatees for
whom assets
not marshalled.

1st. It appears to be now settled, that equity will *not* marshal the assets, in instances, where the legatees, at the time of the legacies becoming due, have *not* an established claim distinctly and solely upon the personal estate. If, therefore, a legatee have a claim, at the testator's death, upon both the real and personal assets for the payment of his legacy, but by some subsequent event, as the death of the legatee before the time of payment, the remedy upon the real estate is defeated; the Court will not marshal the assets in favour of the legatee's representative, so as to preserve a personal fund for payment of the legacy.

Legatees for whom assets not marshalled.

Where legatees at the time of their legacies becoming due have not an established claim, &c.

This Lord *Hardwicke* expressed as his opinion in the case of *Prose v. Abingdon* (p), the facts of which are before stated. The executors were not before the Court, and no decree respecting the marshalling of assets, so that the legatee might be satisfied out of the personal estate, could be made; but his Lordship clearly expressed his opinion, that it could not be done: "For that the rule of marshalling assets in manner before mentioned, would hold, only where it was proper to be done at the time the legacy first took place, and not where it was owing to a fact which happened subsequent to the death of the testator, and to a mere accident, the death of the legatee before twenty-one." Lord *Hardwicke*, however, seems to have altered his opinion in the subsequent case of *Reynish v. Martin* (q); but the rule as above stated has been revived by Lord *Loughborough's* decision in the case of *Pearce v. Loman* (r). In that case, *Joseph Palmer* devised all his real estate in the parish of *Brodwinson*, in the county of *Dorset*, to *Robert Pearce* and *Robert Taylor*, upon trust, to permit his mother to receive the rents and profits for her life, and, after her decease, to apply the same for the maintenance and education of *Thomas Pearce*, son of *Robert*, until he should attain twenty-one, and when he should attain twenty-one, in trust for him in fee; and if he died under twenty-one, upon other trusts. The testator gave to *Thomas Pearce*, and *Robert*, another son of *Robert Pearce* the elder, 1,000*l.*, to be paid at twenty-one, with interest at three *per cent.* in the mean time from his (the testator's) death, to be applied for the support and education of *Thomas Pearce* and *Robert Pearce* the younger. After several other legacies, the testator gave other real estate in the parish of *Crewkerne*, in the county of *Somerset*, and all the

(p) 1 Atk. 482, *supra*, p. 654;
Ord v. Ord, 2 Dick. R. 439; S. P.

(r) 3 Ves. 135; see also Duke of
Chandos v. Talbot, 2 P. Wms. 612.

(q) 3 Atk. 320.

Legatees for
whom assets
not marshalled.

residue of his personal estate, subject and charged with the payment of his debts, legacies and funeral expenses, to his two trustees, in trust, to see his debts, legacies and funeral expenses paid, and, after payment thereof, in trust for his cousin *John Perkins* absolutely, upon condition he should discharge the testator's debts, legacies, &c., and the testator appointed his said trustees executors. *Robert Pearce* the younger died under twenty-one, intestate and unmarried, whose father as administrator claimed the legacy. The question was, whether, as the legacy was a charge upon the real as well as the personal estate, the Court would so marshal the assets, as to direct payment of the legacy out of the personal estate, although it failed as a charge upon the lands by the death of the legatee before the time of payment. Lord *Loughborough*, C., after noticing Lord *Hardwicke's* observations before stated in *Prowse v. Abingdon*, expressed himself thus: "If marshalling could be carried to the extent of *Reynish v. Martin*, it might have been pursued in all the cases, that have been decided. There is a singularity in the doctrine, as it now stands; that, as far as it affects one fund, it is good; as far as it affects the other, bad: but it would be still more singular, if it shall sink in one case, and not in the other, but the land making good the personal estate shall be charged. The point was of very little moment in *Reynish v. Martin*; for in Mr. *Forrester's* note, the gross amount of the personal estate is stated to be 100*l.*, and Mr. *Wilbraham*, in Lord *Hardwicke's* note, says, it is 100*l.* odd shillings and pence, therefore he speaks accurately from an account of it. The legacy was 800*l.* Therefore, I would not follow that case to introduce a new point with regard to marshalling assets against established rules. The assets cannot be marshalled. It would be directly against *Prowse v. Abingdon*: the contingency is the same, and I cannot charge the real estate indirectly. I have found, in Lord *Hardwicke's* note book, the case of *Lowe v. Mosley* referred to in the argument. There is very little of it, but exactly what he states. The note is this: "*Lowe v. Mosley*, upon the will of *Mills*; 300*l.* given to his daughter: 150*l.* at the age of twenty-four; 150*l.* at twenty-six. He devises his real estate to his son *James*, he paying debts and legacies. Several questions upon acts the son had done. He had mortgaged: questioned, whether the charge remained against the mortgagee. She died between twenty-four and twenty-six. I was of opinion, that 150*l.* was due; but that the other 150*l.* sunk into the real estate, she dying under twenty-six." Not a word said about marshalling: it was mixed a fund,

and a mortgage, I think, was one of the charges that affected the personal estate."

Legatees for
whom assets not
marshalled.

Charities.

2. Equity has also refused to marshal (*s*) the assets in favour of legacies given to charitable uses; as that would be considered a mean to evade the Statute of Mortmain (*t*), and to effect, in substance, a charge upon the land, within the spirit of that act.

Assets not
marshalled
in favour of
legacies to
charity.

In *Mogg v. Hodges* (*u*), *Jane Churchill* devised her real estate to trustees, to be sold, the profits to be applied to the uses of the will. She directed that her debts and legacies should be paid out of the personal estate, made the trustees executors, and left them all the residue of her personal estate, and of the money to arise by sale of the real, to be given in what charities they should think proper, recommending particularly to them the hospital at *Bath*. The question was, whether the assets should be so marshalled, that all the other legacies should be paid out of the real estate, so as to leave the personal to go to the charity; and Lord *Hardwicke* said, he thought himself not warranted to set up a rule of equity, contrary to the common rules of the Court, merely to support a bequest which was contrary to law.

In the case of *Attorney General v. Tyndall* (*v*), *Mary Packer* devised all her freehold and leasehold estates, to trustees to sell, and out of the money to buy ground for an almshouse in the parish of *St. James's*, in the city of *Bristol*; and likewise to erect an almshouse, and to lay out the residue of the money in land; and out of the rents and profits to pay certain stipends to twenty poor people, whom she had before appointed to be in the almshouses; and until such purchases could be made, she directed the money to be laid out on real or Government securities. And in case the charity could not by law take place according to her directions, then she ordered her trustees to lay out the money in such charitable uses, intents, and purposes, as near to her intention as could be, and the laws would permit. She then gave the residue of her estate to such uses, intents, and purposes, as aforesaid. By a decree in 1759, it was declared, that the devise of the freehold and leasehold estates to the charity was void; and an account was directed to be taken of the personal estate. On further directions, the *Master of the Rolls* declared that, if the trustees could obtain the gift of a piece of ground in *Saint*

(*s*) For instances of apportionment, *vide infra*.

(*u*) 2 Ves. sen. 52.

(*v*) Amb. 614.

(*t*) 9 Geo. 2, c. 36.

Legatees for
whom assets
not marshalled.

Charities.

James's parish, *Bristol*, they might erect an almshouse upon it, and declared, that the trustees were entitled to have the assets marshalled, by applying the leasehold in the first place in payment of debts, legacies, funeral expenses, and costs, in order to leave more of the personal free and clear for the purposes of the charity. The defendants having appealed from this decree, Lord *Henley*, Chancellor, after argument at bar, and time for consideration, thus delivered his opinion: "As to the freehold, there is no doubt that must go to the heir-at-law. The question respects only the leasehold, which, by reason of the devise being void, falls into the *residuum*: and on this, whether the Court shall marshal the assets and by applying the leasehold in the first place to payment of debts, leave the other assets to be applied to the charity, and by that mean do *per obliquum*, what could not be done *per directum*. This would be a method to elude the statute, which I will not do. The second question respects the building an almshouse, if the trustees can get the ground given them. The decree in this part is founded upon the precedent of the *Attorney General v. Bowles*, which is an authority for the *Master of the Rolls*. But I feel only one authority, that of the House of Lords, which is a superior Court; no other authority has any influence on my judgment. The precedent has no influence upon me; it is contrary to the spirit of the statute. In common sense, it is laying out money in land: it improves the site, is demandable in a *præcipe*, and is a purchase of so much realty; such a determination is opening a door to avoid the statute;" and his Lordship held the devise of the residue to be void, as being given to be laid out in lands and tenements; and the decree was reversed.

Again, in *Foster v. Blagden* (w), *Sarah Knapp* devised her real and personal estate, after payment of her debts, funeral expenses and charges of proving her will, to the plaintiffs, in trust, to dispose thereof, and directed the trust money to be paid to certain charitable uses. The question was, whether the Court would marshal the assets, and order the debts to be paid out of the real estate, in order that the personal might be left clear, so that the devise to the charity might take effect. *Smith*, Baron, who sat for the Lord Chancellor, declared his opinion, that the debts could not be thrown upon the real estate; and that the cases of *Mogg v. Bath Hospital*, and the *Attorney General v. Tyndall*, were in point.

(w) Amb. 704.

Again, in *Hillyard v. Taylor* (x), *William Brown*, after devising an estate to the plaintiff and his family, and several legacies, bequeathed all his personal estate, together with his estate at *Farfield*, held by lease of the Bishop of *Winchester*, descendible to his right heirs, in trust, to sell the said estate, and out of the money to pay his just debts, funeral expenses and several legacies, and the Warden and Fellows of *Winchester College* 100*l.*, to be disposed of as they should think fit, for the use of superannuates, not succeeding to *New College*; to the county hospital at *Winchester*, 50*l.*; to the Governors of the charity for relief of poor widows and children of clergymen, 600*l.*: and after reciting, that it was uncertain what his effects might amount to, he gave whatever remained, after payment of debts, legacies and other charges, to his executors, to be disposed of to such charitable uses as they should think fit, and appointed *Taylor* and *Knapp* executors. In 1761, the *Master of the Rolls* decreed, that if the personal estate should be wholly or in part exhausted, in satisfying the debts and funeral expenses, and such of the legacies as were not given to charity, then the legatees of the charitable bequests should stand in the place of specialty creditors, and receive a satisfaction *pro tanto*, out of the real estate: but without prejudice to the question, whether the legacy of 100*l.* given to the Warden and Fellows of *New College*, was within the saving clause of the Statute of Mortmain, which might arise, in case the before mentioned marshalling of assets should not be sufficient to furnish the whole of the legacies given to charities; and he directed an account of the rents and profits of the *Hampshire* estate, and the balance to be applied to make good the deficiency of the personal estate; and if those funds should prove deficient, the real estate in *Hampshire* to be sold, and applied to make good the deficiency. The personal estate and the rents and profits of the *Hampshire* estate, proving deficient, that estate was sold, and the purchase money paid into the Bank, and laid out in 4,295*l.* 15*s.* 8*d.* three *per cent.* annuities. After twelve years, there was an appeal from the above decree, occasioned by the determination of *Foster v. Blagden* (y). The Lord Chancellor, without hearing the reply, reversed the decree, so far as related to the charitable legacies to *Winchester Hospital*, and for the relief of widows and children of clergymen, on the authority of *Foster v. Blagden*, and directed an inquiry, what fund was established at *Winchester College*, to defray the expense of superannuates at

Legatees for
whom assets
not marshalled.

Charities.

(x) Amb. 713.

(y) *Supra*, preceding page.

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either of the Universities; and after ordering the costs, declared that the residue of the three *per cents.* belonged to the heir-at-law.

In *Makeham v. Hooper* (z), *Joseph Lloyd*, being seised of freehold and copyhold estates, and possessed of leasehold and other personal property, devised to trustees all his freehold, leasehold, copyhold and personal estates to sell, and out of the money to pay, among other legacies, 200*l.* to the *Bath* Infirmary, and other charitable legacies to the amount of 1,200*l.*; also 200*l.* to erect a monument to the memory of *J. Curle*; and after payment of several general legacies, to pay the surplus of the money arising from the real and personal estates, unto the plaintiff, and *D. Evans*, and appointed them executors. *Evans* died in the life of the testator. By codicil, among other legacies, the testator gave to two of the defendants 100*l.* in trust for another charity, (but without naming any fund out of which it was to be paid), and ordered a monument to be erected to himself. He afterwards made a second codicil, by which he gave some legacies, and died in *November* 1781, leaving the plaintiff his surviving executor and residuary legatee, and two others of the defendants his heir-at-law, and next of kin, who had assigned their claims to the plaintiff. The bill, after the usual prayer in regard to the will and codicils, and the general personal estate, prayed that the charitable legacies might be declared void, and to fall into the residue; and that the real estate might be sold, and the clear residue of the money, as also the testator's personal estate might be declared to belong, and be paid to the plaintiff as residuary legatee. The cause was heard before Lord *Thurlow*, C., in 1784; and by the decree, the will and codicils were declared well proved, and ought to be established, and the trusts performed; and it was referred to the Master to take the proper accounts, and to distinguish what arose from chattels personal, and chattels real; and he reserved the consideration, whether the charity legacies were to be paid, and in what manner, and all further directions till after the Master's report: from which report, it appeared, that the money received by the plaintiff and the trustees, amounted to 1,988*l.* 7*s.* 7½*d.*, and that they had paid 1,037*l.* 15*s.* 5*d.*: so that there remained a balance of 950*l.* 12*s.* 2½*d.* That the legacies, besides the charitable ones, amounted to 4,490*l.* So that the personal estate fell short of paying the same in 3,539*l.* 7*s.* 9½*d.*; and that the real and leasehold estates sold for above 6,000*l.* The question

(z) 4 Bro. C. C. 153.

was, whether the assets should be marshalled? And it was decreed in the negative; *Ashurst*, Lord Comm. observing, that "he thought they were bound by the recent cases with respect to the question of marshalling: that it did not appear what was the reason of the turn in the cases, but as the decisions had taken that course, they would not alter them." But the legacy to the *Bath Infirmary*, was ordered to be paid, in consequence of the Act of the 19 Geo. 3, c. 23, permitting that charity to take in mortmain (a).

Legatees for whom assets not marshalled.
Charities.

3. The preceding authorities clearly settle the rule, that the Court of Chancery will not marshal the assets, so as to throw the debts upon the real estate and leave the personal a clear fund for the charity; but it will be proper in this place to notice a rule of the Court in the administration of the general residue bequeathed to a charity, and consisting partly of mortgage securities and leaseholds which savour of the realty, and partly of assets purely personal. In such case, the bequest of the residue, so far as regards the mortgage securities and leaseholds, fails, as being within the Statute of *Mortmain*, and lapses for the benefit of the next of kin. As between such next of kin, who are considered in the light of legatees of the mortgage securities and leaseholds, and the charities which have an indisputable right, as legatees of the other personalty not partaking of the nature of real estate, the Court will not allow a creditor or general legatee to resort exclusively to the assets purely personal, to the disappointment of the charity, but will direct a rateable contribution by the charities and next of kin, in proportion to their respective interests, for the satisfaction of the debts and legacies. In the exercise of this branch of equitable jurisdiction, the Court adopts a rule well established by the cases on marshalling, namely, that a person having two funds to resort to for the satisfaction of his demand, shall not, by his option of resorting to either of those funds, determine whether one of two parties, whose equities are equal, shall be paid or not.

Marshalling, &c. not allowed for charities, but contribution between them and next of kin where general residue given, part whereof consists of mortgages and leaseholds.

The above rule respecting contribution does not appear distinctly stated, although it was acted upon in the case of *Attorney*

(a) See also *Att. Gen. v. Lord Weymouth*, Amb. 20, *infra*, vol. 2, Chap. XIX. sect. III. div. 2; *Hobson v. Blackburn*, 1 Kern. 274; *Philan. Society v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Ib. 462; *Flint v. Warren*, 9 Jur. 420.

Contribution
between chari-
ties and next of
kin, where resi-
due given to
the former,
partly consist-
ing of mort-
gages and
leaseholds.

General v. Winchelsea (b). Nor indeed, has the editor discovered an earlier case, wherein it is explicitly laid down.

In the case just mentioned, and which will be more fully stated in a subsequent part (c) of this work for another point, the Rev. *Robert Chapman* bequeathed the residue of his personal estate to trustees, upon trust to invest it in the funds, and apply the annual produce for the support of certain charities.

A considerable part of this residue consisted of money secured on mortgage. One of the questions in the cause was, whether the bequest of the residue, so far as it related to the real securities, was not void, as being within the Statute of *Mortmain*, and it was insisted for the next of kin, that they were entitled to these mortgage securities. The *Master of the Rolls*, as appears from a note of part of his judgment given in *Bell's* edition, page 380, first considered the cases as proving that the assets could not be marshalled; and then said that he conceived this case to stand upon the same ground, as if the testator had specifically bequeathed his mortgages to one person, and the other part of his personal estate to another. In such a case, they should contribute to the payment of the debts and legacies *rateably*, according to the amount of what they each took. The next of kin, in that case, he considered, as if he had been a legatee of the mortgages, and therefore decreed that the payment of the debts and legacies should be made out of the mortgages, and out of the rest of the personal estate *rateably* according to the amount of each of them respectively.

The rule was stated in *Howse v. Chapman* (d), *arguendo*, by the counsel for the next of kin, and acted upon by the Court. In that case, *Leonard Coward*, after enumerating several specific parts of his residuary personal estate, gave the same, after payment of debts, legacies, funeral and testamentary expenses to be appropriated to the improvement of the city of *Bath*. There were parts of the personal estate not enumerated, and undisposed of. After the testator's death the bill was filed by the executors to establish the will, and ascertain the rights of the parties; the heir-at-law and next of kin contending, that the bequest of the residue was void for uncertainty of its object, or, if not void on that ground, it was void under the statute 9 Geo. 2, c. 36, as to such parts as were of the nature or consisted of real property.

(b) 3 Bro. C. C. 373, S. C.; 2 Cox, 364; *nomine Att. Gen. v. Hurst*.

(c) Chap. XIX. sect. v.
(d) 4 Ves, 542.

By the decree the will was established, and the trusts directed to be carried into execution, except as to the money secured on real estate; and an account of the personal estate was directed. From the *Master's* report, it appeared that part of the personal estate, which was held to pass by the bequest for the improvement of the city of *Bath*, consisted of mortgages to the amount of 4,950*L.*, certain bonds of the commissioners for the improvement of the city of *Bath*, *Bath* corporation and turnpike bonds. The cause coming on for further directions, a point was made on behalf of the next of kin, that the debts, legacies and funeral expenses, and the costs of all parties were to be paid in equal shares, out of the personalty bequeathed for the improvement of the city of *Bath* and the personal estate undisposed of. On behalf of the next of kin, *Attorney General v. Winchelsea* was cited, and it was urged, that "where a residue is left for charitable purposes including mortgages and other interests that cannot go to the charity, the debts and legacies shall be paid out of the two parts of the estate *pro rata*;" and the Lord Chancellor said, the bequest to the city of *Bath* of particulars enumerated was specific, that the articles not enumerated went to the next of kin, and that the *general* residue was to be applied, in the first place, in payment of debts and other charges. He further observed, that the case was directly within *Attorney General v. Winchelsea*, with regard to the mortgages and other things that were taken out of the bequest; because the law takes them out of it. The decree declared, that the bequest for the improvement of the city of *Bath* was a charitable bequest, and that the mortgages and bonds of the commissioners for the improvement of the city of *Bath* and the turnpike bonds did not pass, but were undisposed of by the will, and belonged to the next of kin; and it was directed that the *Master* should distinguish such of the particulars of the personal estate specifically bequeathed for the improvement of the city of *Bath*, as *were* well given, from such particulars as did not pass thereby, but belonged to the next of kin; and it was further ordered, that the same be applied *pro rata* for the payment of so much of the testator's debts, legacies and funeral expenses, and of so much of the costs as the general residue of the testator's personal estate undisposed of by his will would not extend to pay, and that such particulars of the personalty, specifically bequeathed for the improvement of the city of *Bath*, as did not pass, be divided, after payments before directed, among the testator's next of kin, according to the Statute of Distribution; and that such particulars, specifically bequeathed for the

Contribution between charities and next of kin; where residue given to the former, consisting partly of mortgages and leaseholds.

Contribution between charities and next of kin, where residue given to the former, consisting partly of mortgages and leaseholds.

improvement of the city of *Bath*, as were well given, after the payments thereout directed, be paid to the defendant, the clerk to the commissioners for the improvement of the city of *Bath*.

Again, in *Paice v. The Archbishop of Canterbury (e)*, *Mary Wilks* gave the remainder of her different bequests to the Archbishops of *Canterbury* and *York* for the time being, in trust for charitable purposes, and bequeathed her house in *Grosvenor Square*, and all her property in *London*, to be sold; and after payment of a mortgage, the monies arising from the sale to be applied to the general purposes of her will. The *first* question was, if the general residue passed to the Archbishops of *Canterbury* and *York* for charitable purposes; and *secondly*, if so, whether the money produced by the sale of the testatrix's leasehold house in *Grosvenor Square*, and freehold estate in *London*, were liable to any part of the debts, legacies, and costs. The *Lord Chancellor* decided, that as to the real estate devised to the charity, and personal estate connected with land, as leaseholds and mortgages, the disposition was void under the statute (*f*); and, at the conclusion of his judgment, observed, the same arrangement must take place by apportionment of the charges between the funds, as in the case of *Attorney General v. Winchelsea*.

Lastly, in the case of *Curtis v. Hutton (g)*, the above rule received a further confirmation. In that case, *George Hutton* directed his real estates to be sold, and declared that the produce of such sale, and the rents in the mean time, should constitute part of his personal estate, and be subject to the trusts thereof: and he bequeathed his personal estate, and the monies to be produced from his real estate, to trustees, to pay debts and legacies. He then bequeathed 200*l.* to the trustees of a charity school in *Butt Lane, Deptford*, for the purpose of purchasing lands contiguous: and he declared the trusts of the residue of his personal estate to be for such purposes as he should by deed or codicil appoint. By codicil, the testator directed the trustees to lay out the trust monies in the purchase of freehold estate in *Great Britain*, or in the public funds, or in other proper security, the income of the trust fund to be applied in an establishment for students in the *King's College of Old Aberdeen*. The bill was filed by the trustees against the widow and only daughter

(e) 14 Ves. 372; see 1 Rus. & Myl. 759, note.

(f) 9 Geo. 2, c. 36.

(g) 14 Ves. 537; see also *Crosbie v. The Mayor of Liverpool*, 1 Rus. & Myl. 761, n.

of the testator, to have the will established, and trusts carried into execution. The answer insisted that the bequests of the residue to the college at *Old Aberdeen* of the 200*l.* to the charity were void, and submitted, whether, if the former were good as to the personal estate, it ought not to be postponed until after payment of debts and legacies. It was contended on their behalf, that, supposing the disposition void, the debts, legacies, and annuities must be thrown upon the fund which was effectually given to the charity; and also upon that fund, the disposition of which failed, in the proportion the respective funds bore to each other, according to the rule established in the *Attorney General v. Winchelsea*. The *Master of the Rolls* said, the rule, as contended for, was settled by many cases: and he determined also, that nothing which was the produce of the testator's real estate passed under the dispositions to the charities.

Contributions between charities and next of kin, where residue of a mixed nature given to the charity.

The reader will observe the distinction between the rule of *contribution* established by the class of cases just discussed, and the case of *marshalling*. By marshalling, the Court would indirectly allow the charge upon the real estate for the benefit of a charity, contrary to the Statute of *Mortmain*; and the practical result would, in most cases, be that of excluding the next of kin wholly, or in part, from that portion of the residue which fails by the statute, and to which by law they have an equal right with legatees, to whom legacies are effectually given. On the other hand, the Court, in adopting the rule of *contribution* before stated, considers the equities of the next of kin and the charities equal, and therefore directs a rateable contribution from each toward the payment of debts and legacies.

Since the former edition of this work cases have arisen, in which the above rule of apportionment has been further discussed and applied; they seem to have suggested the conclusion, "that every charitable legacy bequeathed by any testator, whose will does not contain the usual clause directing such legacies to be paid exclusively out of the personalty, and the general residue of whose property consists partly of leaseholds or real securities, is void *pro tanto*" (h). The rule of apportionment adopted by the Court of Chancery in such cases, as clearly stated by Lord *Cottenham*, C., in *Williams v. Kershaw* (i), is to appropriate the fund as if no legal objection existed to applying any part of it to charity legacies, then holding so much of the charity legacies to fail, as would in that way be paid out of the prohibited fund.

(h) 1 Jar. on Wills, 210, ed. 1844.

(i) 1 Keene, 274, n.

Contributions
between cha-
rities and next
of kin, where
residue of a
mixed nature
given to the
charity.

The decree in *Baker v. Sutton* (j) carries out this rule, which was also acted upon by Lord Langdale, M. R., in *Hobson v. Blackburn* (k). In the latter case the testator gave a charity legacy out of a fund composed of pure personalty and leaseholds, and the general personal estate was insufficient for the payment of the legacies: his Lordship observed, that the rule applicable to the apportionment of the assets, where the testator made a charitable bequest, whether particular or residuary, out of a mixed fund, was settled, and had been so long recognized and acted upon, that in that Court it could not be re-opened.

The rule as above stated and acted upon being established, the precise arrangement of his property adopted by the testator to effect his charitable purpose, would seem to be perfectly immaterial; so that, if he fails to direct the payment of a charity legacy exclusively out of his pure personal estate, the rule of apportionment must equally apply, whether the bequest is of a mixed fund upon trust to sell and thereout to pay the charitable legacy, or whether the charity legacy is of a pecuniary nature, or the general residue given to others, or particular legacies are given to one charity, and the residue is given to other charities.

Nor in favour
of an alien.

4. A fourth instance in which Courts of Equity will not marshal the assets of a testator is in the case of an alien; but they adopt the same rule of contribution as in the case of legacies to charity out of a mixed fund.

Thus, in *Fourdrin v. Goudey* (l), an alien who had obtained letters of denization, directed by his will that all his property, consisting of freehold leasehold and other personal estate, should be converted into money, and after payment of his debts and legacies, that the residue should be divided among his brothers and sister, who were aliens residing abroad. One of the questions in the cause was between the Crown and the testator's next of kin, how the charges on the several descriptions of the testator's property were to be apportioned, with reference to the admitted right of the residuary legatees to the surplus of the pure personal estate. Sir John Leach, M. R., decided that the estates of the testator, partly real and partly personal, must bear the charges imposed on them in proportion to their respective values; observing, that an alien may take beneficially money or other personal estate, not consisting of chattels real; and in order to apportion the burthen, the rule to be applied in that case was

(j) 1 Keene, 224.

(k) Ib. 273.

(l) 3 Myl. & K. 383.

the rule adopted in the case of charities; the proper course would be for the Master to inquire how much of the general produce of the testator's estate had arisen from real estate and chattels real, and how much from personal estate, and then to set a value upon the two portions of the estate respectively, and the legacies and charges must be borne by each in proportion to its value.

Contribution between charities and next of kin, where mixed residue given to former.

SECT. VII. The mode in which *equitable* assets are distributed among creditors and legatees.

When assets are marshalled in favour of a legatee, the personalty having been wholly or in part applied in payment of a debt, we have seen that since the 3 & 4 Wm. 4, c. 104, the legatee may resort to the real estate to the amount of the personalty applied in satisfaction of the debt; and in such case, if there are several legatees, they will be paid *pari passu*; and if the fund be insufficient to satisfy the whole of their respective legacies, each legatee must abate in proportion to the amount of his legacy. But if the case is not one of marshalling, there being but one fund for the payment of all claimants, as, for example, where there are not any personal assets, and the real estate is either devised upon trust to pay, or only charged with the payment of debts and legacies, in such case the assets are *equitable*; and it remains to consider in the present section, the mode in which such *equitable* assets are distributed among creditors and legatees.

How equitable assets distributed among creditors and legatees.

Before the statute of 3 Wm. & Mary, c. 14, a *specialty* creditor had not at common law any remedy for the recovery of his debt against a *devisee* of the real estate for the payment of debts (*m*), but he was obliged to resort to the assistance of a Court of Equity. The estate, therefore, thus devised was considered *equitable* assets. By the statute above mentioned, devises of real estate were made void against specialty creditors, their real and personal representatives; in favour of whom remedies were given by the statute against the heir and devisee, without the aid of a Court of Equity. In this act, there is a proviso excepting out of its operation devises of real estate for *the payment of debts*, or *portions* for children under articles or settlement *before* marriage; so that such devises for payment of debts and portions, continued as they were before the statute, subject to equitable jurisdiction; and consequently real estates thus devised were assets distributable upon the principle of the Court, that equality is equity.

(*m*) *Plunket v. Penson*, 2 Atk. 291.

How equitable assets distributable among creditors and legatees.

The above statute, with others, was repealed by the 11 Geo. 4, & 1 Wm. 4, c. 47 (1830), and the clauses above referred to, were re-enacted with additional provisions, for facilitating the recovery of debts upon bond, covenant, or other specialty. By the statute 3 & 4 Wm. 4, c. 104, cited in a former page (*m*), freehold, copyhold, and customary estate, not by will charged with, or devised subject to the payment of debts, is made assets, to be administered in Courts of Equity for the payment of debts due as well on simple contract as on specialty; and the heirs and devisees of debtors are made liable to the same suits in equity, at the suit of any debtors by simple contract or specialty, as the heirs or devisees of any persons dying seised of freehold estate, were liable before the act, in respect of such freehold estate at the suit of creditors by specialty, in which the heir was bound. The act provides, that in the administration of assets by Courts of Equity, by virtue of that act, all creditors by specialty in which the heirs are bound, should be paid the full amount of their debts before any of the creditors, by simple contract or by specialty on which the heirs are not bound, shall be paid any part of their demands.

It is now clearly settled that real estate devised upon trust to pay (*n*), or merely charged (*o*) with the payment of debts, and although descending (*p*) upon the heir thus charged, are equitable assets, and distributable, *pari passu*, among creditors, whether by specialty or simple contract.

Thus in the case of *Plunket v. Penson* (*q*), *Penson* the testator, who was the *cestui que trust* of real estate, mortgaged it in fee, and being entitled to the equity of redemption, devised the estate to his son and his heirs, subject to the payment of debts, annuities and legacies, and died indebted by bond and simple contract. The questions were, whether the assets of the testator were legal or equitable? and whether the simple contract creditors were to come in *pari passu* with the plaintiff, the bond creditor, or whether the bond creditor should be paid in course of administration. It was insisted for the simple contract creditors, that the devise to an heir of an estate charged with debts was the same thing as devising it in trust to him for the payment of debts; that they were equitable assets, and all creditors entitled to come in *pari passu*: that the bond creditor could not recover at law, because the testator, who was obligor, had not the legal

(*m*) Page 975.

(*n*) *Barker v. May*, 9 Bar. & Cress. 489; *Soames v. Robinson*, 1 Myl. & K. 500.

(*o*) *Bailey v. Ekins*, 7 Ves. 319.

(*p*) *Hargrave v. Tindal*, 1 Bro. C. C. 136, note.

(*q*) 2 Atk. 290.

estate, and the estate was in mortgage, so that he was obliged to come into a Court of Equity for a satisfaction. Lord *Hardwicke* decided, that the assets were *equitable*, and distributable among the creditors, without any distinction as to priority; and he directed an account of the testator's personal estate to be applied in payment of his debts, in a course of administration; and if that should not be sufficient, then an account of the rents and profits of his real estate to be applied in payment of the debts not satisfied by the personal estate, *pari passu*: and if the personal estate, and the rents and profits of the real should not be sufficient to pay the debts, it was ordered, with the consent of the mortgagees, that the real estate should be sold, and the money, after payment of the mortgages, applied in discharge of what should be remaining due to the other creditors of the testator *pari passu*: and that if any of the creditors by specialty should have exhausted any part of the personal estate in satisfaction of their debts, they were not to receive any further satisfaction out of the real estate, until the other creditors should be made up thereout equal to them (*r*).

How equitable assets distributable among creditors and legatees.

In the case of *Soames v. Robinson* (*s*), the testator devised all his real estate to trustees upon trust to sell, and directed that the money arising from such sale should sink into and become part of his personal estate: and he bequeathed the same and all his stock, crops, goods, and effects whatsoever (except wearing apparel and furniture given to his wife) to the trustees upon trust, after converting the same into money, and paying all his debts, funeral and testamentary expenses, to pay legacies. The specialty creditors had exhausted the personal estate, and the simple contract creditors petitioned that specialty creditors should bring the personal estate into hotchpot, before they received any part of the produce of the real estate. This was opposed by the specialty creditors on the ground, that upon the true construction of the will, the produce of the real estate was legal assets, and as such distributable among the creditors according to their legal priorities. They contended that the testator did not devise the land for the payment of debts, but merely to be sold, and added to his personal estate, and that he did not intend to alter the mode of administering his assets. Sir *John Leach*, M. R., decided that the assets were equitable, and distributable equally. His Honor observed that if the testator,

(*r*) See also *Silk v. Prime*, 1 Bro. & Cress. 364, and the cases cited in the judgments.
C. C. 138, note; *Bailey v. Ekins*,
7 Ves. 319; *Shiphard v. Lutwidge*,
8 Ves. 26; *Clay v. Willis*, 1 Barn. (s) 1 Myl. & K. 500.

How equitable
assets distri-
butable among
creditors and
legatees.

after devising his real estate to be sold, and expressing his wish that the produce should become part of his personal estate, had stopped there, the argument would have been forcible in favour of the specialty creditors, that the testator did not intend to deprive them of their legal priority; but his Honor added the testator proceeded in the following words, "And I give and bequeath the *same* (that is the produce of the real estate directed to become part of his personal estate), and all my stock, &c. to the trustees upon trust, after converting the same into money, and paying all his debts, &c. His Honor was, therefore, of opinion that it was a devise within the 4th section of the 3 & 4 William & Mary, c. 14.

But this equality of distribution is confined to those only, whose equities are equal, as to creditors among themselves; and is not extended to *legatees* jointly with creditors; for the latter will be preferred to the former; and this, although *the trust* be for the payment of debts *and* legacies, or although the real estate be *charged* with the payment of both. There is indeed an *anonymus* case in *Vernon* (*t*), the decision in which directed that the debts and legacies should be paid in proportion; as the assets were equitable; there are also *dicta* in other cases (*u*) corresponding with that direction. There are two cases, however, determined in favour of the priority of creditors, *viz.*, Sir *John Bowle's* case (*v*), determined upon a rehearing by Lord *Nottingham*, in which he reversed the decree of Lord Keeper *Bridgman* in favour of an indiscriminate distribution among the creditors and legatees; and declared his opinion "that in the case of trust for the payment of debts and legacies, the debts ought to be preferred and satisfied, before the legatees should have the benefit of the trusts."

Lord *Harcourt* also pronounced a similar decree in the case of *Petre v. Bruen* (*w*). There a testator before the Statute of Fraudulent Devises, devised a freehold estate to his second son in fee, subject to the payment of his debts, and a legacy of 500*L*. The question being, whether the debts should be preferred to the legacy? Lord *Harcourt* said, he would expound the testator's meaning, as it ought to be, to pay his debts before he was charitable, and therefore decreed the debts to be first paid (*x*).

(*t*) 2 Vol. 133.

(*u*) 2 Vern. 405; 2 P. Wms. 551.

(*v*) Cited by Lord Com. *Hutchins* in *Greaves v. Powell*, 2 Vern. 248.

(*w*) Stated in *Walker v. Meager*, 2 P. Wms. 551.

(*x*) See also *Kidney v. Cousmaker*, 12 Ves. 154, per Sir *William Grant*; *Walker v. Meager*, Moseley Rep. 204; 2 P. Wms. 551; *Maylen v. Hooper*, Cas. temp. Hard. 206.

CHAPTER XVI.

Of the Repetition of Legacies.

IT has frequently happened that two legacies have been given to the same legatee by the same or different testamentary instruments, and questions have arisen accordingly, whether the second bequest should be construed as merely a *repetition*, and intended by the testator only in substitution of the legacy first given; or, whether it should be considered as *accumulative* and intended as an additional benefit to the legatee. The leading cases that have occurred upon the subject, and the rules that may be collected therefrom, will be stated in the present chapter, under the following arrangement:

SECT. I. Where two Legacies are given by the *same* testamentary instrument, whether will or codicil; and,

- 1.—*Where the legacies so given are of equal amount.*
- 2.—*Where the legacies differ in amount.*

SECT. II. Where Legacies are given by *different* testamentary instruments, namely, by will and codicil, or by different codicils; and where the Legacies so bequeathed are given *simpliciter*.

- 1.—*Where the legacies thus given in both instruments are equal.*
2. *Where they are unequal.*
3. *Where they are not ejusdem generis.*

SECT. III. Where the Legacies given by the *different* instruments are *not* given *simpliciter*, but a different or additional motive is expressed.

Of the repetition of legacies, in the same instrument of equal amount.

SECT. IV. Where the Legacies are given by different testamentary instruments, and the instrument giving the second Legacy furnishes *intrinsic* evidence that the second Legacy was merely given in substitution of the former, and not intended as accumulative.

SECT. V. On the admissibility of *parol* evidence to rebut the presumption in favour of accumulative Legacies.

SECT. I. Where two legacies are given by the same testamentary instrument, whether will or codicil.

Where two legacies given by same instrument of equal amount.

1. And *first*, where two legacies are given by the same testamentary instrument, whether by will or codicil, and where the legacies are of *equal* amount; in such case the Court of Chancery has, agreeably to the Civil law (*a*), inferred an intention in the testator to give but one legacy, the second mention of the legacy being merely a repetition.

Thus, in the case of *Greenwood v. Greenwood* (*b*), *Hester Joyce* bequeathed to her niece *Mary Cook*, wife of *John Cook*, 500*l.* and afterwards in the same will, among other legacies, gave “to her cousin, *Mary Cook*, 500*l.* for her own use and disposing, notwithstanding her coverture;” and Lord *Bathurst*, C., declared, that *Mary Cook* was entitled to one legacy only of 500*l.*, and that the same was for her separate use. The cause was afterwards re-heard upon this point, and the decree affirmed.

So also in *Garth v. Meyrick* (*c*), two legacies of 1,000*l.* each were given in the same will to the same legatee. The first bequest was, “I give to *Mary Garth* 1,000*l.* *Old South Sea annuities* to be transferred into her own name;” and towards the close of the will, the second bequest was in these words: “I give to *Mary Garth* 1,000*l.* *Old South Sea annuities* as aforesaid.” It was endeavoured to support these as separate legacies, and that the legatee should take both; but it was decreed, that she was entitled only to one legacy.

(*a*) Swinb. pt. 7, sect. xx. and
xxi., pp. 526, 530.

(*b*) 1 Bro. C. C. 30, note.

(*c*) Ib. 30.

Again, in *Holford v. Wood* (d), *Dame Elizabeth Wood*, among many other legacies in the same will, gave an annuity in these words; "to *Thomas Newman* I give an annuity of 30*l.* for his life, payable quarterly, at the usual quarter days as shall first happen after my death;" and towards the conclusion of her will the testatrix added, "After my death, I give to *Thomas Newman*, the butler, 30*l.* a year for his life." The question was, whether *Thomas Newman* was entitled to two annuities of 30*l.* a year, or to one such annuity only; and it was decreed by Lord *Alvanley*, M. R., that the second annuity of 30*l.* given to *Thomas Newman* was not to be considered as accumulative, but as the same annuity of 30*l.* given to him in the prior part of the will.

Where the same sum twice given in the same instrument.

In *Brine v. Ferrier* (e), where legacies of the same amount in the same terms to the same legatees were given in two imperfect testamentary papers, in one of which other legatees were named. Sir *L. Shadwell*, V. C., held that the Ecclesiastical Court had considered all the papers admitted to probate as forming one testamentary instrument, and therefore the legacies were not cumulative, but single.

In *Early v. Benbow* (f), the testator by a codicil to his will, gave a legacy of 500*l.* to each of the four children (naming them) of one of his brothers; and by the same codicil, he directed his executors to pay out of his personal estate 500*l.* a piece to each child "that may be born" to either of the children of either of his brothers, to be paid to each of them, on his or her attaining the age of twenty-one years without benefit of survivorship. Sir *K. Bruce*, V. C., held, on a careful consideration of the whole instrument, that the testator did not intend by the latter gift to benefit the four grandchildren named, and that they were not entitled to take double legacies.

The preceding cases are instances wherein the sums or annuities were given *simpliciter*; but it is presumed cases may occur wherein a second bequest of the same sum, as was before given in the same testamentary instrument, would, upon the implied intention, be considered accumulative, notwithstanding words of accumulation, such as "and," "moreover," "further," "in addition to," &c., may not be expressly used in giving the second legacy. For instance, if a testator in the former part of his will were to

When not given simpliciter.

(d) 4 Ves. 79, 91; see also *Manning v. Thesiger*, 3 Myl. & K. 29; *Baylee v. Quin*, 2 Dru. & W. 116; *Adam v. Cole*, 6 Beav. 353; *Yockey v. Hansard*, 3 Hare, 620.

(e) 7 Sim. 549.

(f) 2 Col. 354.

Where *unequal*
legacies in the
same instru-
ment.

give 200*l.* to *A.* and in the latter part add, “in case my executors recover *B.*’s debt due to me, I give to *A.* the sum of 200*l.* ;” or these words, “if *A.* marries *C.* then I give him 200*l.*” Again, suppose a testator to give 400*l.* to each of his nieces *D.*, *E.*, and *F.*, and at a subsequent part of the same testamentary instrument were to add, “I give to my dear niece *E.* the sum of 400*l.* in consideration of her long and affectionate attendance upon me during my present illness.” Cases, however, affording examples resembling those supposed have not been met with in the books. But,

Where *unequal*
legacies in the
same instru-
ment.

2dly. Where the legacies given by the *same* testamentary instrument to the same person are of *different* amount, the legacy shall be considered *accumulative*.

Thus in *Windham v. Windham* (*g*), *Thomas Windham*, father of the plaintiff, having by his will made a provision for his children by name, by the same will gave to every other son or daughter which he should afterwards have by his wife *Elizabeth*, 1,000*l.* a piece, to be paid to such as should be daughters at eighteen, to sons at twenty-one. The testator lived three years after making his will, and during that time had issue, *John*, the plaintiff, by his wife *Elizabeth*; and in *January* 1653, after the birth of the plaintiff, and in his own handwriting, added another clause to his will, by which he appointed his executors to raise 4,000*l.* out of certain real estates for the portion of *John*, whom he called his little infant, and afterwards republished his said will, and three days after died. It was objected, against the plaintiff’s demand for both sums, that he ought not to have the 1,000*l.* for that he would have a double portion, and by a strange construction of the will have one portion as a child unborn, and another as a child born; but the Court was of opinion, that the plaintiff was entitled to both the legacies, and decreed the defendant to pay the same with costs.

So also in the more modern case of *Curry v. Pile* (*h*), *John Walsh* bequeathed legacies in the following words: “I give to *Elizabeth Curry*’s son, *John Curry*, 1,000*l.* when he arrives at the age of twenty-one, the interest of which to be paid to his mother till he arrives at the age of ten years; and then I desire my executors will take him and put him to a proper school for his education; and when he arrives at that age, I desire they will expend out of my estate 100*l.* a year, till he arrives at twenty-

(*g*) Finch R. 267.

(*h*) 2 Bro. C. C. 225.

one, and then I give him 5,000*l*." The question was, whether *John Cherry* should take both the legacies, or only one; for the plaintiff was cited the fourth case put by Mr. Justice *Aston* in *Hookey v. Hatton* (i), and Lord *Thurlow*, C., decreed that he was entitled to both.

Where unequal legacies by the same instrument.

SECT. II. Where legacies are given by *different* testamentary instruments, namely, by will and codicil, or by different codicils, and where the legacies so bequeathed are given *simpliciter*.

Where two legacies are bequeathed to the same person by *different* testamentary instruments, namely, the one by the will, the other by the codicil; or where they are given by different codicils, and the testator has given both of the legacies *simpliciter*; the Court, in such cases, in the absence of intrinsic evidence, considers, that as the testator has given twice, he must *prima facie* be intended to mean two gifts: and it seems to be immaterial, whether the legacies are of equal or unequal amount, or whether they are of the same or different natures (j).

Where legacies given by different instruments are given *simpliciter*;

1. And *first*, where *equal* sums are given in the *two* instruments.

and equal in amount.

Thus in the case of *Wallop v. Hewett* (k), Lady *Crofts*, by will, gave *Henry Wallop* and *John Wallop*, the plaintiffs, 100*l*. a piece; and afterwards by codicil, gave them 100*l*. a piece. Upon the question, whether the legacies in the will and codicil were one and the same, or distinct and several, the Court, with the Judges, were of opinion, that they were distinct and several; and decreed the defendants to pay the plaintiffs 400*l*.

Newport v. Kynaston (l) is a similar case. There Lady *Catherine Lawson*, by will, gave to her goddaughter *Katherine Newport* some jewellery, and 500*l*.: and by a codicil gave a legacy to the brother of the said *Katherine Newport*, and then added; "I give to his sister, my goddaughter, *Katherine Newport*, 500*l*. in silver." The Court was of opinion, that the plaintiff was entitled to 1,000*l*. and decreed accordingly.

So also in the case of *Baillie v. Butterfield* (m), *Thomas Baillie* made his will, dated 5th of *January* 1779, with these words: "I,

(i) *Infra*, p. 1003.

(k) Rep. in Cha. pt. 2, 37.

(j) See Mr. Justice *Aston*'s argument in *Hookey v. Hatton*, *infra*, p. 1003.

(l) Finch. Rep. 294.

(m) 1 Cox, 392, 19 July, 1787.

Where equal legacies by different instruments are given *simpliciter*.

Thomas Baillie, &c. do make this my last will and testament. As to all my worldly estate and effects, of which I may die possessed, I do give and bequeath to my adopted son, *E. Butterfield*, son to the late Captain *Butterfield*, deceased, upon his attaining the age of nineteen years; but in case of his demise before that period, then to my dearly beloved brother, *John Baillie*, and to my two sisters, to be equally divided amongst them, share and share alike; and at this present time, agreeable to my fortune, I leave 500*l.* to each: and I hereby nominate and appoint Major *Peter Duff*, *Henry Grant*, and *William Paxton*, in the town of *Calcutta*, my true and lawful executors." This will was published by the testator, in the presence of two witnesses. Upon the same paper, under this will, there appeared to be written, in the testator's handwriting, as follows: "I also say my brother 500*l.*, and my two sisters 1,000*l.* between them, *Thomas Baillie*." It did not appear when this was written, nor was there any circumstance in proof relating to it. But in the Ecclesiastical Court probate was granted of these two writings as a will and codicil. The bill was filed by the brother and two sisters, claiming to be entitled to double legacies; *i. e.* 500*l.* each by the will, and 500*l.* each by the codicil. It was argued, on the part of the defendant, that the second writing was only explanatory of the former bequest. But Sir *Lloyd Kenyon*, Master of the Rolls, considered the probate granted by the Ecclesiastical Court as conclusive to show, they must be taken as distinct instruments; and in that case the rule was, that the legacies are to be taken as accumulative, and consequently, that in that case the plaintiffs were respectively entitled to their double legacies of 500*l.* The decree in this case is not regularly entered in the Register's book, but the Editor, upon search, found it in the Register's minutes as taken in Court, under the title of *Baillie v. Paxton*.

But in the more recent case of *Benyon v. Benyon* (*m*), Sir *William Grant*, M. R., observed, "The point, whether the mere circumstance that legacies, even by different instruments, are of the same amount, raises a presumption against their duplication, is, upon the authorities, left in some degree of doubt. In the case of *Ridges v. Morrison* (*n*), Lord *Thurlow*, though professing to adhere to the case of *Hooley v. Hatton* (*o*), yet says, 'Where the same quantity has been given, and the same cause, or no additional reason assigned for a repetition of the gift, the Court

(*m*) 17 Ves. 41.

(*n*) 1 Bro. C. C. 389, *infra*, p. 1006.

(*o*) 1 Bro. C. C. 389, note, *infra*,

p. 1003.

has inferred the testator's intention to be the same, and rejected accumulation; and in another case (*p*), Lord *Thurlow* says, 'Simple repetition, where it is exact and punctual, has been regarded as sufficient proof that it is only intended for repetition.' His Honor determined the duplication of the repeated legacy in *Benyon v. Benyon*, on the general construction of the instruments (*q*).

Where equal legacies by different instruments are given *simpliciter*.

It may be proper to notice, in this place, the subsequent case of *Currie v. Pye* (*r*). *Charlotte Susannah Beard*, by will, dated 12th February 1802, devised her real estates to trustees, in trust to sell; and gave the defendant, *Sarah Pye*, an annuity of 20*l.*, payable half-yearly during her life. Subject to this annuity, and to any others she might thereafter give, she directed her trustees to stand possessed of the residue of her personal estate, and the produce of the monies to arise from the sale of her real estate, in trust for the benefit of such persons, and for such purposes, as she, by any codicil, memorandum, paper, &c. might appoint. The testatrix left two papers, which were proved with her will. By the first, dated January 29th, 1801, after giving to *Ann Peers*, of *Chester*, a legacy of 1,000*l.* for her own sole use, she proceeded thus: "To Dr. *Currie*, of *Chester*, I give and bequeath 1,000*l.*, with thanks for his goodness to me;" and after an intermediate bequest: "To Dr. *Currie*, of *Chester*, I give and bequeath my uncle *Beard's* pictures." The other paper began thus: 1,000*l.* to Dr. *Currie*, together with my uncle *Beard's* picture, and the whole of my plate; to *Ann Peers*, of *Chester*, 1,000*l.* for her life. After her decease, I bequeath this 1,000*l.* to *Henrietta Trafford*, of, &c. with an annuity for life upon it payable to *Sarah Peers*, sister of the said *Ann Peers*:" and after other legacies: "To *Sarah Pye*, of *Newcastle*, my father's old servant, I bequeath 20*l.* a year during her natural life, to be paid to her in quarterly payments." On the 28th of February, 1809, a decree was made at the *Rolls*, whereby it was declared, among other things, that the plaintiff *Currie* was entitled only to one legacy of 1,000*l.*, together with the picture of the testatrix's uncle *Beard*, and the whole of the plate; but the defendant, *Sarah Pye*, was entitled to two annuities of 20*l.* for life, and *Ann Peers* to 1,000*l.* for her separate use, and to the interest of another sum of 1,000*l.* for

(*p*) *Moggridge v. Thackwell*, 1 Ves. jun. 464, 473, *infra*, p. 1015.

(*q*) See *Forbes v. Lawrence*, 1 Col. 495.

(*r*) 17 Ves. 462, and see *Radburn v. Jervis*, 3 Beav. 450; *Ford v. Ruxton*, 1 Col. 403.

Where equal legacies by different instruments are given *simpliciter*.

life. It is to be remarked, that the legacy of 1,000*l.* to Dr. *Currie* was coupled in each instrument with *Beard's* picture; an identical specific thing which could be given but once: and it is presumed that his Honor considered this as sufficient evidence, that the testatrix made the second mention of the legacy merely in the way of repetition, and not as intending a further benefit. With respect to the annuities to *Sarah Pye*, no such evidence of intention is furnished in either instrument; but on the contrary, in the second paper, the bequest of the annuity is accompanied with an additional expression, intimating a motive of regard towards the annuitant, as an old family domestic. The distinctions, as stated by Sir *John Leach*, V. C., in the case of *Hurst v. Beach*, noticed in a subsequent section of this chapter (*r*), are well supported by the authorities.

Where unequal legacies by different instruments are given *simpliciter*.

2. *Secondly*, where the legacies given in the two testamentary instruments are *unequal*.

Of this the early case of *Pit v. Pidgeon* (*s*), is an instance: but as the point is not involved in any doubt, and is clearly settled by more recent cases, a detailed statement of that case is considered unnecessary.

In the case of *Masters v. Masters* (*t*), the legacies were not only unequal, but some were *ejusdem generis*, and others not. There *Mary Masters*, among several legacies to her relations and other persons, bequeathed to her nieces *A.*, *B.* and *C.* legacies, viz. to *A.* and *B.* 200*l.* a piece, and to her niece *C.* 400*l.* By a codicil, the testatrix gave general legacies to several of the legatees in the will, many of which were larger than the legacies given by the will; and she gave her three nieces *A.*, *B.* and *C.* 50*l.* a year for their lives. It was objected, that as the general legacies in the codicil exceeded those in the will, and were given to the same persons, they should be in satisfaction of the legacies by the will; and particularly, that where the annuities given by the codicil were of greater value than the legacies in the will, and were given to the same persons, they should preclude such persons from claiming both. But the Court said, that the annuities by the codicil, though given to the same persons who were pecuniary legatees in the will, and though of greater value, should not be taken to be a satisfaction of the pecuniary legacies

(*r*) *Infra*, p. 1007; see also *Lee v. Pain*, 4 Hare, 201, 216, and stated *infra*, p. 1009.

(*s*) Cas. in Chan. 301.

(*t*) 1 P. Wms. 421, 423,

in the will, because the annuities were not *ejusdem generis*, and the annuitant might die the next day after the death of the testatrix: and nothing being more uncertain than life, the latter gift, instead of being a bounty, might be a prejudice, if taken to be a satisfaction of the legacies by the will. That the codicil was part of the will, and proved as such; and that the greater pecuniary legacy given by the codicil to the same person, who was a pecuniary legatee on the will, should not be taken to be a satisfaction, unless so expressed that it was (*u*), as if both the legacies had been given by the same will.

Where unequal legacies by different instruments are given *simpliciter*.

So in the case of *Hooley v. Hatton* (*x*), a legacy by codicil larger than that given by the will was considered as accumulative. There Lady *Finch*, by her will dated the 30th of *August*, 1768, gave to *Lydia Hooley*, her woman (the plaintiff) a legacy of 500*l*. The will was executed in the presence of two witnesses. By her first codicil she gave *Lydia Hooley* 60*l*. to be paid to her; she added a second codicil, dated *October* 28, 1769, in these words: "I add this codicil to my will, I give to *Lydia Hooley* 1,000*l*." The last codicil was in testatrix's handwriting, but unattested. The plaintiff filed her bill for the legacies. The question was, whether the last legacy alone passed, or the legatee should have both the 1,000*l*. and 500*l*. The *Master of the Rolls* decreed both to the plaintiff; and the defendant appealed to the *Chancellor*, who being assisted with Chief Baron *Smyth* and Mr. Justice *Aston*, confirmed the decree. Mr. Justice *Aston*, in an elaborate argument, observed, "Where equal sums are given in two distinct writings, both should pass by the Roman Law, and the decisions of the Court are agreeable thereto (*y*), where the less sum was in the latter instrument, as 100*l*. by will and 50*l*. by the codicil, the legatee should take both (*z*); when a larger sum after the less, he observed, *Ricard*, 421, folio edition says, when they are in the same instrument, the two sums are not blended,

(*x*) The punctuation of this part of the report is altered as suggested by Lord *Bathurst* in *Hooley v. Hatton*.

(*x*) 1 Bro. C. C. 389, note; see 2 Russ. 269, note; *Watson v. Reed*, 5 Sim. 431; *Gordon v. Hoffmann*, 7 Sim. 29; *Tweeddale v. Tweeddale*, 10 Ib. 453; *Suisse v. Lord Lowther*, 2 Hare, 424; *Marquis of Hertford v. Lord Lowther*, 7 Beav. 107; *Lyon v. Colville*, 1 Col. 449.

(*y*) Digest, 22, t. 3, l. 12, and Gothofred's note in diversis scripturis, Digest 30, t. 1, l. 34, in eadem scripturâ. Cajucius, 4, 381, distinction between corpus and quantity. Voet on the 31 and 32 Digest Godolphin, pt. 3, c. 26, s. 46; Swinb. 526; *Ricard Traité des presump.* 1, 4; 2 Chan. R. 58.

(*z*) Godolphin, pt. 3, c. 25, s. 19; Ca. in Ch. 301.

Where unequal legacies by different instruments are given *simpliciter*.

but the legatee has two legacies, and the heir must show that one was meant to be blended with the other, the presumption being in favour of what is written (a). "The law," *Aston*, J. continued, "seems to be, and the authorities only go to prove the legacy not to be double, where it is given for the same cause, in the same act, and *totidem verbis*, or only with small difference; but where, in different writings, there is a bequest of equal, greater or less sums, it is an augmentation, and therefore the plaintiff was entitled to both sums."

Where given *simpliciter*, but not *ejusdem generis*.

3dly. If legacies, given by will and codicil to the same persons, when given *simpliciter*, and whether of equal or unequal amount are, *prima facie*, to be considered accumulative, *a fortiori* they will be so, when they are not *ejusdem generis*; as where one is given as a general legacy, the other by way of annuity; or, where one is vested, or another depending upon a contingency: such variation in the nature of the gifts, furnishes an additional degree of evidence of intention in the testator to bestow a twofold benefit.

To the case of *Masters v. Masters* (b), before stated, that of *Hodges v. Peacock* (c) may be added in illustration of the preceding rule. In that case *Wickens Hodges*, by his will, dated 21st February, 1794, after several legacies, gave and bequeathed to *William Hodges* the plaintiff, his son by his first wife, the sum of 150*l.*; and also bequeathed to him the ground rents of two leasehold houses in *Great Cumberland Place*, to hold to him, his executors, administrators, and assigns. By a written paper, dated 1st of May, 1795, he gave certain instructions to his executors, &c. By a codicil, dated 27th July, 1795, the testator gave legacies to his children, by his second wife, to whom he had respectively given legacies by his will; and declared that he gave all the said legacies so given to his children by his second wife in addition to the legacies given them by his said will. The codicil then proceeded thus: "I give unto my son, *William Hodges*, by my first wife, 150*l.*, if he be living; and in case of his death before the decease of my present wife, I give the said *William Hodges* 150*l.*, to be equally divided among his five children, or such of them as may be then living, share and share alike. I revoke the devise of the two ground-rent-houses in *Great Cumberland Place*, which I had given to my son, till after

(a) *Windham v. Windham*, *supra*, p. 998; *Pit v. Pidgeon*, Ch. Cas. 301.

(b) *Supra*, p. 1002.

(c) 3 Ves. 735.

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Where legacies by different instruments are not given *simpliciter*.

grandson for his maintenance and education. The testator gave to his wife 500*l.* over and above what he had given her by his will. Upon appeal from the decision of Sir *John Leach*, V. C., that the legacies were cumulative, Lord *Eldon*, in confirming his Honor's judgment, observed, that under the last limitation in the will the infant, immediately upon the death of the testator, would have become entitled to the 4,000*l.* absolutely as sole next of kin to his mother, she having made no appointment; and that, as the sum bequeathed by the codicil was not payable till the legatee attained twenty-one, it could not be taken as a satisfaction of the legacy given by the will; because in that case, it would take away from him the right to a sum of money, which in events which happened, vested in him absolutely at the moment the testator died.

We proceed to state instances, where the legacies given by *different* instruments are *not given simpliciter*.

SECT. III. Where the legacies given by the *different* instruments are *not given simpliciter*, but a different or additional motive is expressed.

Where legacies by different instruments are not given *simpliciter*.

In *Ridges v. Morrison* (e), *Nicholas Toke* by his will ordered his real estate to be sold by his executors, and the money applied in aid of his personal estate: and, among several legacies, gave to *Nicholas* and *Mary Layton*, the children of his nephew, *Isaac Layton*, 500*l.* each. By a codicil, written under his will, he gave to *T. Ashley* 20*l.*, and to *Nicholas Layton* "that I put apprentice to a grocer near *Cripplegate*, 500*l.*" The *Nicholas Layton* mentioned in the codicil was the same *Nicholas Layton* to whom 500*l.* was given by the will. The bill prayed that he might be decreed entitled only to one of the sums of 500*l.* It was argued in support of the prayer of the bill, that the rule was, when the same precise sum is given in the will and codicil, it is mere repetition, not duplication; and for this the Duke of *St. Albans v. Beauclerk* (f) was cited. But Lord *Thurlow*, C., after noticing the case of *Hooley v. Hatton* (g), observed, "In the present case, it happens, an additional cause or mark of favour has been mentioned in the codicil, which proves that the testator meant and intended an accumulative legacy; considering the slight inferences made in former cases (and which I must confess have

(e) 1 Bro. C. C. 388, *Belt's* edit.

(f) 2 Atk. 636, stated *infra*, p. 1013.

(g) *Supra*, p. 1003.

tended to throw property into jeopardy and uncertainty), such an inference as arises in this case, is sufficient to turn it the other way, and to induce the Court to say, that it operates as an accumulation. In the will the legacy of 500*l.* is given to *Nicholas Layton*, (the testator enumerating him among the other children of *Isaac Layton*), upon the general consideration of favour which the testator bore towards the family: the other legacy of 500*l.* in the codicil is given with this additional mode of description adjoined to it, 'to *Nicholas Layton*, the child whom I put out an apprentice,' which circumstance marks the legatee as a peculiar object of favour; and, consequently, such an inference of the testator's intention, as to induce the Court to say it is an additional legacy."

Where legacies are given by different instruments, but not *simpliciter*.

Upon the same principle, it is presumed, Sir *William Grant*, in the case of *Currie v. Pye* (*h*), decreed *Sarah Pye* entitled to the two annuities of 20*l.*, as before remarked.

To the preceding authorities the case of *Hurst v. Beach* (*i*), before Sir *John Leach*, V. C., may be added, which is an instance, where *different* sums were given, but the *same* motive annexed to each of the gifts; the cases last cited being instances where the legacies were of *equal* amount, but an *additional* motive. *B. Heath*, by will dated 2d of *January*, 1812, gave several legacies, and added the following words: "I also give and bequeath to *John Bach* (meaning the defendant *John Beach*), now living with me, the sum of 300*l.*" By a codicil dated the 11th *February*, 1814, the testatrix gave several other legacies of 500*l.* each, and added, "to my man servant, *John Beach*, a like legacy or sum of 500*l.*:" and, upon the question, whether the 500*l.* given by the codicil were a satisfaction of the 300*l.* by the will, or accumulative, his Honor delivered his opinion in the following words: "In cases of this class, considerable confusion has been introduced from the inaccuracy of reporters. The material errors in *Atkyn's Report* (*k*), of the leading case of the Duke of *St. Albans v. Beauclerk* are pointed out by Lord *Bathurst* in his judgment in *Hooley v. Hatton* (*l*); and no person can read Lord *Thurlow's* reported judgment upon this subject without observing he is often made to contradict himself. I think the true result of the decisions, as they apply to the present point is to be stated thus: where a testator leaves two testamentary instruments, and in both has given a legacy

(*h*) Stated *supra*, p. 1001.

(*i*) 5 Madd. 351.

(*k*) 2 Vol. 636.

(*l*) *Supra*, p. 1003.

Where legacies are given by different instruments, but not *simpliciter*.

simpliciter to the same person, the Court, considering that he who has twice given, must, *primâ facie*, be intended to mean two gifts, awards the legatee both legacies; and it is indifferent, whether the second legacy is of the same amount, or less, or larger than the first. But if, in such two instruments, the legacies are *not* given *simpliciter*, but the motive of the gift is expressed, and in both instruments the *same* motive is expressed, and the *same* sum is given, the Court considers the two coincidences as raising a presumption, that the testator did not, by the second instrument, mean a second gift, but meant only a repetition of the former gift. The Court raises this presumption only where the *double* coincidence occurs, of the *same motive* and the *same sum* in both instruments. It will not raise it if in either instrument there be no motive, or a different motive, expressed, although the sums be the same; nor will it raise it, if the same motive be expressed in both instruments, and the sums be different. The presumption therefore, cannot be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different; and upon the face of these instruments the defendant is entitled to both sums. This reasoning has no application to cases where the second instrument affords intrinsic evidence that it was intended by the testator in substitution of the first instrument, as in the cases of the Duke of *St. Albans v. Beauclerk* (*m*), *Coot v. Boyd* (*n*), and the late case of *Attorney General v. Harley* before me" (*o*).

In *Lord v. Sutcliffe* (*p*), the testatrix by her will bequeathed as follows; "unto my nephew *Thomas Lord*, fifty shillings a month, for the term of his natural life, to be paid to him monthly after my decease, in lieu of him giving up all other notes and claims. Also unto my niece *Mary Knowles*, the daughter of my late niece *Sally Lord*, the sum of 150*l.* to be paid twelve months after my decease, if she is then living. By a subsequent codicil the bequest was as follows; "I do give and order that *Mary*, the daughter of *John Knowles* have 200*l.* twelve months after my decease, if she is then living: also I give *Sally*, the daughter of *Thomas Lord*, 200*l.* after her father's decease: also to *Thomas Lord*, I give and order that he shall have 3*l.* a month the time of his natural life: also I give unto the Chapel at *Mill Wood* 60*l.*, and *all other things* to be paid and done as the will hereto directs."

(*m*) 2 Atk. 636.

(*n*) 2 Bro. C. C. 521.

(*o*) 4 Madd. 263.

(*p*) 2 Sim. 273; see also *Strong v. Ingram*, 6 Sim. 197.

Upon a bill by *Thomas Lord* claiming both monthly payments, *Sir Lancelot Shadwell*, V. C., decided that he was so entitled upon the authority of the last case.

Where legacies are given by different instruments, but *not simpliciter*.

The subject of the present chapter has undergone elaborate discussion in the recent case of *Lee v. Pain* (q), in which are found legacies bequeathed to individuals by the will or a codicil, and legacies in some instances of the same, in others of a different amount, afterwards given to the same individuals by the first or some subsequent codicil: of the legacies given in the later instrument, some were expressed to be in addition, to others in substitution of the legacies given to the same legatees by the will or prior codicil; while others were given *simpliciter*. The will and codicils of the testatrix *Ann Waring*, are fully set out in the report of the case. The matter first came before *Sir James Wigram*, V. C., on a separate report made by the Master relative only to some of the legatees. The testatrix had by her will, among other legacies, given to thirteen persons, who were named in one sentence, and who were described only by their names and residences, 100*l.* a piece, of whom *A. B.* was one. By the first codicil, after varying some of the bequests in her will, and giving to the trustees of the chapel at which she attended, 100*l.* to be laid out for the benefit of the chapel, the testatrix gave the said *A. B.*, describing him as "minister of the said chapel," the sum of 100*l.*, and then confirmed her will. By a third codicil, she gave to the same *A. B.* the sum of 100*l.* "in addition" to what she had bequeathed him by *her will*: and in this codicil she confirmed her will and codicils, distinguishing the will from the codicils. By her fourth codicil, she gave to the same *A. B.* 100*l.* and confirmed her will and codicils: she then made a fifth codicil in which *A. B.*'s name did not appear, and by that also she confirmed her will and former codicils. The legacies to *A. B.* in the third and fourth codicils, were expressed to be "in addition" to what she had before given him. The question arose upon the will and first codicil, whether the legacy in the first codicil was a mere repetition of that in the will. *Sir J. Wigram*, held *A. B.* entitled to both legacies, observing that legacies given by different instruments to the same legatee *simpliciter* were cumulative, unless the effect of the separate gifts was contradicted by the construction of the latter instrument, or by presumption of law; and that the right to the repeated legacies in such cases did not depend upon a legal presumption, but was found in

(q) 4 Hare, 201. 216, &c.

Where legacies by different instruments are not given *simpliciter*.

the construction and effects of the instruments, and no extrinsic evidence was admissible, to prove that the legatee was intended to take one legacy only. His Honor then said, "It does not, however, follow that in every case in which legacies are given by different instruments, the legatee will be entitled to claim as many legacies as there are instruments. The claim may be displaced by showing that the instruments contain intrinsic evidence, that the legacies were not intended to be cumulative, or by showing that the case is of that class in which Courts of Law raise a presumption against the accumulation. In the present case it has not been suggested, that, if, upon the construction of the will and codicils, *A. B.* is entitled to the legacies given in each instrument in which his name appears, there is any legal presumption to deprive him of what the will and codicils give him. He is a stranger, and I may observe in this case as I did in *Suisse v. Lord Lowther* (r), referring to *Pym v. Lockyer* (s), that in case of legacies to strangers, there is no principle upon which a Court of Equity should incline against cumulative legacies. Those, therefore, who undertake to show that one legacy only was intended, must show that such is the case on the construction of the will and first codicil, and, failing the proof of that, the legal right must prevail. By the legal right, I mean the right arising from the legacies being given by two separate instruments, that is, from there being two distinct gifts." His Honor then proceeded to consider the effect of the words "in addition," as used in some of the gifts and omitted in others, and after examining the various cases applying to the subject, concluded thus, "Upon these authorities it is, that I found the observation, that it may well be doubted whether the words in question can safely be relied upon, except in corroboration of an argument arising from other circumstances, whether the use of superfluous words in one part of a will, is alone sufficient to reduce the proper effect of words in another part of the same instrument,—whether, in such a case, the rule *expressio eorum quæ tacite insunt nihil operatur*, ought not to be applied." His Honor then observed, that the argument founded on the words "in addition," was met by the observation, that some of the legacies were expressed to be given in lieu of those given by the will, and that these words were omitted before the bequest under discussion. His Honor also alluded to other circumstances favourable to the legatee's

(r) 2 Hare, 424.

(s) 5 Myl. & C. 29.

claim to both legacies, (namely) the repetition in the latter instrument of some legacies and not of others, implying that a benefit is intended in the case of the former legatees greater than in the case of the latter, and that the circumstance that the different legacies carried interest from different dates, was favourable to the claim of the legatee to both. The case came again before the Vice Chancellor on exceptions to the Master's general report, when his Honor adhered to his former observations, and stated as the governing principle of his decision that the right of a legatee under the general rule of construction to several legacies bequeathed by different instruments was not repelled by circumstances, which only raised a mere balance of argument that the legacies were substitutional; that the pecuniary legatees and not the residuary legatees were entitled to the benefit of the doubt which the form of the bequests had created. An argument had been used against the legatees to the effect, that the points of resemblance between the will and first codicil arising out of the giving of the legacies in question, was such that the codicil was to be taken as a substitution for the will: in dealing with this argument his Honor proceeded to examine the case of the Duke of *St. Albans v. Beauclerk*, and the other cases mentioned in section iv. of the present chapter, distinguishing them from the case before him, and added, "where all the legatees in a will are provided for by a codicil, the case is open to the argument that the testatrix, may have intended to substitute a codicil for that integral part of the will by which legacies are given, as in *Gillespie v. Alexander*. But if the codicil does not extend to all the legacies in the will, and no explanation can be offered why some are named in the codicil and others omitted, the cases assume a different aspect. To say in such a simple case that the codicil is substitutionary for the legatees named in the codicil itself, only because they are named there, is not to state an exception to the rule, that legacies by different instruments are cumulative, but to deny the rule itself." His Honor subsequently added, "Unless I am in error, there are in the will (including the charity legacies) thirty-four legatees separately mentioned, whose names do not appear in the first codicil, and of which thirty-four legatees, twenty are not, and fourteen are named in subsequent codicils; and to this must further be added the observation, that the will contains specific legacies, a residuary clause, and the appointment of executors not touched by the first codicil. To this statement there is an additional observation not favourable, certainly, to the claim of the executors, that amongst

Where legacies by different instruments are not given *simpliciter*.

Where the legacies by the second instrument are substitutional.

the seventeen legacies in the codicil, to which I have just adverted, are some which it is next to impossible to treat as substitutions. I allude particularly to the legacies to the children of *Harry Sherer*, which are said to be substitutionary for legacies to the parent, and the annuities to which I before referred. Whatever conjecture may do, it appears to me that I must go much beyond any decided case, if I were to hold that the first codicil is a substitute only for the legacies mentioned in it." His Honor decided accordingly in favour of the legatees.

SECT. IV. Where the legacies are given by different testamentary instruments, and the instrument giving the second legacy furnishes *intrinsic* evidence that the second legacy was merely given in substitution of the former, and not intended as accumulative.

Where the legacies by the second instrument are substitutional.

The preceding observations lead us to the fourth section, comprising those cases wherein the second instrument has been considered as furnishing internal evidence of an intention on the part of the testator inconsistent with the presumption of the second gift being accumulative, and in which cases the presumption has accordingly been repelled; for example, where the codicil is a simple repetition of the will, with the addition of one legacy or more; or, when it appears that the latter instrument was made for the purpose of explaining or better ascertaining the legacies bequeathed by the former (*t*).

The case of the Mayor, &c. of *London v. Russell* (*u*), is an instance in illustration of the preceding proposition. In that case *Giles Russell*, by his will (among other things) bequeathed his goods, jewels and household stuff in his house in *Coleman Street*, at the time of his death, together with 1,000*l.* to his wife *Micha*, in satisfaction of dower, &c. In *October*, 1669, he wrote a codicil in these words: "Whereas there is 1,000*l.* given to the said *Micha* by my former will, I do now give 1,600*l.* and whatsoever is in my former will to my wife, and that my former will shall stand in full force, notwithstanding the codicil." The testator died, and then his wife; and, upon the question, whether her executors should have both the 1,000*l.* and 1,600*l.* the Court was clearly of opinion, that they should have only 1,600*l.* and

(*t*) See *Methuen v. Methuen*, 2 James Wigram, V. C. Phillim. 416; 4 Hare, 217, per Sir (u) Finch R. 290.

that the testator, besides the specific legacies, intended to give his wife no more, and therefore decreed accordingly.

Where legacies
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Again, in the *Duke of St. Albans v. Beauclerk (v)*, *Diana Duchess Dowager of St. Albans*, by her will in 1734, after disposing of some of her personal estate, expressed her intention to dispose of the residue by codicil or codicils, which she directed to be part of her will. In 1738 she made a codicil; in 1740 she made two others, not to the present purpose; in *September* 1741 she made a fourth codicil, under which the particular legatees claimed additional legacies; but the residuary legatee contended it was to be substituted in the place of the first codicil. Lord *Hardwicke* thought it a case of very great difficulty; in his opinion, he stated at length the two codicils; the material parts whereof were as follows, comparing each article with the opposite column.

FIRST CODICIL.
By virtue and in pursuance of the power reserved in my last will and testament, I do declare that this writing shall be a codicil to and part of my will.
I give and bequeath, viz.
To Lord *Henry Beauclerk* 1,000*l.*
To Lord *George* - - 1,000*l.*
To Lord *Aubery* - - 1,000*l.*
To Lord *Vere* 100*l.* worth of either pictures, China, or Japan.

To Lord *Sidney* 100*l.* worth of either pictures, furniture, or plate.
To Lord *James* 100*l.* of plate, books, or furniture.
To Miss *Caroline* my single stone diamond ring.
To my eldest son my ruby ring.
To his wife my emerald ear rings.
To Lady *Die* my ruby ear rings with pearl drops.
To *Webb*, my woman, 500*l.* for her diligent, honest, faithful service.
To *Catherine Dickens* - - 200*l.*
To *Die Wise* - - - 20*l.*
To *James Buchanell* - - 50*l.*
To *Biar*, the cook - - 50*l.*

FOURTH CODICIL.
The same introduction, *By virtue*, &c.

To Lord *Henry* - - 300*l.*
To Lord *George* - - 300*l.*
To Lord *Aubery* - - 300*l.*
To Lord *Vere* 100*l.* worth of either pictures, China, Japan, or furniture.
To Lord *Sidney* 100*l.* worth of either pictures, plate, or furniture.
To Lord *James* 100*l.* worth of furniture, China, or plate.

These legacies were given in the same words as in the first codicil.

To my woman, *Webb*, 600*l.* for her diligent, honest, faithful services.
To *Catherine Dickens* - 200*l.*
To *Die Wise* - - - 100*l.*
To *James Buchanell* - - 50*l.*
To *Francis Biar* - - 50*l.*

Where legacies
by second in-
strument sub-
stitutional.

To all the servants one year's wages.

To several persons legacies of China.
To several persons small legacies,
both specific and general, of whom
no notice is taken in the fourth
codicil.

And now I desire, that what remains
in money, &c. may be applied to the
best use, for the advantage and
increase of Miss *Caroline Beauclerk's*
fortune, which I leave to the fidelity,
discretion, and care of my executors
and sons, Lords *Sidney, Vere, Henry,*
George, and James.

To *T. Jones* 20*l.* and to the rest of
her servants one year's wages.
To Lady *Die* all her China.

And now, &c. (same as in the first
codicil), which I leave to the discre-
tion, care and fidelity of my execu-
tors and sons, Lords *Vere, Sidney,*
George, and Henry.

After a very elaborate discussion of the instruments themselves, and then the authorities which he considered applicable to the case, his Lordship decided upon the internal evidence, which the second instrument furnished, of its not being the Duchess's intention to give by the fourth codicil accumulative legacies.

Again, in *Campbell v. Earl of Radnor* (*w*), *Elizabeth Hutcheson*, by will dated 1st August, 1761, gave several legacies, among others, to *Mary Call*, 10*l.*, also to *Mary Wooldridge* and *Barbara Smith* other legacies. By a codicil dated in 1768, she gave to *Mary Call*, 40*l.*, instead of 10*l.* in the will; to Mrs. *Wooldridge*, for her and her brother, 100*l.*; to *Barbara Smith*, 200*l.* By a second codicil in 1777, she gave to *Mary Call*, 40*l.* instead of 10*l.* in the will; to *Mary Wooldridge* for herself and family, 100*l.*; to *Barbara Smith*, 300*l.* The bill prayed that the second codicil might be declared to have revoked the first, and for that purpose it was contended, that the second codicil was made, under a variation of circumstances, to enlarge some of the legacies, the testatrix considering the first codicil as being to be immediately destroyed after the execution of the second; in proof of which it was proposed to read the evidence of *Jackson* the attorney, who prepared the second codicil, but this was rejected. Lord *Loughborough* said, if the reading of the evidence of *Jackson* was opposed there, it would be better to proceed upon it in the Ecclesiastical Court for a repeal of the probate of the codicil; that evidence would have been a ground to exclude the codicil from the probate. The cause stood over, and coming on again a few days after, the Lords Commissioners *Loughborough, Ashurst, and Hotham* decreed the second codicil a mere substitution for the

(w) 1 Bro. C. C. 271.

first, and, therefore, that the defendants were entitled to the legacies given by the second only.

Where legacies
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stitutional.

In *Moggridge v. Thackwell* (x), the testatrix made her will in 1779, and afterwards added four codicils, of which the two first contained legacies to the same persons very nearly similar. The first question was, whether those legacies in the second codicil were to be considered as additional, or as mere repetition. The first codicil was dated the 12th of *April*, 1780, and was in the handwriting of the testatrix, and was to the following effect; "Codicil to my last will and testament, which I desire to be taken as part thereof: I give to *Peter Tricket*, of *Craven Street*, 100*l.*; to *William Pollock*, of *Downing Street*, 100*l.*; to *Elizabeth Thackwell*, eldest daughter of *John Thackwell*, 600*l.* three *per cent.* consolidated Bank annuities, with the dividends to accumulate till she attains twenty-one; to the four younger daughters of *John Thackwell*, 400*l.* each in stock, with the dividends to accumulate till twenty-one; and if any of the above daughters of *John Thackwell* died before twenty-one, their portions to be divided among the rest; to *George Elliott* 100*l.* over and above what I have given him by my will." The legacy to *E. Thackwell*, as it stood originally in the first codicil, was 600*l.* stock generally, but it had been altered by striking out the word "stock," and interlining in the handwriting of *Robert Woodford*, the words "three *per cent.* consolidated Bank annuities." The second codicil was in the handwriting of *Robert Woodford*, dated the 10th of *May*, 1780, and to the following effect: Codicil to my last will and testament, which I desire to be taken as part thereof: I give to *Peter Tricket*, of *Craven Street*, 100*l.*; the same to *William Pollock*, of *Downing Street*; to *Elizabeth Thackwell*, eldest daughter of *John Thackwell*, 600*l.* three *per cent.* consolidated Bank annuities; and I order my executors to accumulate the dividends for her benefit, to be paid with the principal to her at twenty-one; the same to *Judith*, another daughter, upon the same terms; 2,000*l.* three *per cent.* consolidated Bank annuities to the other four daughters of *John Thackwell*, to be divided equally among such as are living at my decease, upon the same terms; but if any die before twenty-one, such legacies with the accumulation to be equally divided among the surviving sisters; to *Ellen Pheasant*, 5*l.* *per annum* during her life, more than I have given her by my will; to *George Elliott*, 100*l.* more than I have given him by my will, if in my service at my decease." Both codicils were signed by the testatrix, but not attested. By the

(x) 1 Ves. jun. 464, 472.

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other two codicils, which were written by herself, *Elliott* had two other legacies, viz. 50*l.* and 20*l.*; and the testatrix spoke of him in high terms. *Elliott* and *Pheasant* had legacies by the will. *Woodford* died in the testatrix's lifetime. Parts of Lord *Thurlow*'s judgment are reported in the following words: "The first question is, whether the legacies are to be considered as additional, or only a repetition? The question arises merely between the codicils. With regard to the will, the codicils are certainly additional; but the question is, whether they are so with respect to each other, or mere repetition? It is true, the general presumption is, that where a person leaves two different instruments, as a will and a codicil, or two codicils, legacies given by both to the same persons are, generally speaking, to be considered as additional; and that presumption is, upon the other side, checked by this, unless there appears to be some intention to the contrary. I am sorry to say, it is left by former determinations upon very indistinct grounds; and it is a great inconvenience, when a question of this kind falls to be decided upon grounds not distinct. But it is impossible now to lay down a rule of discretion, without departing from the cases, which have established, first, that the second instrument is additional to the first, because, *prima facie*, there is no reason why the second instrument should be made, unless the intention was to add to the first; but this of course must be checked by this, that if there be evidence, that instead of addition, it was intended simply as repetition, it is not additional; and *simple repetition, where it is exact and punctual*, has been regarded as sufficient proof, that it is only intended for repetition; but especially if beyond that general article of presumption, the second affords also other presumption of an intention to make it to explain the first; that purpose, if it can be manifested and properly produced, by the form of the second, goes *a multo magis* to prove, that the second bequest, given only with such different terms as serve to assist that purpose, will be considered as a stronger proof, that they are the same legacies better and more correctly explained. I may state at the outset, that certainly it was not intended that the second codicil should be a substitute for the first; that is clear, because by the first there is a legacy to *Woodford*, and none by the second; and there is no expression in the second purporting to adeem the legacies given by the first; and by law those cannot be adeemed by an instrument not relating to the first, and so foreign to it as the second codicil is in this case. If the second instrument makes any or all a repetition, it must be because the second legacies purport to explain the first; and they are so exactly

in the same words as to raise a probability from that circumstance; and standing in the context they are apparently an intention to recall the subject and repeat the instruments." Then, after noticing the explanatory alterations in the second codicil, in the bequests to *Judith*, and the other four daughters of *Thackwell*, his Lordship continued; "It is justly contended upon the bequests to *Elliott* and *Pheasant*, that by the circumstance of referring in each of these to the will, it is plain she meant each to apply in accumulation to the will. If in other respects these codicils were so framed, that the presumption would have arisen from no other quarter, and if the legacies given by them had been upon different terms, and there were no other circumstance to control the inference from thence, these words, '*more than I have given by my will*,' in the second codicil, might have applied to both the will and codicil. But the same interest being given in so nearly the same terms, those words fairly assist the inference, that in writing the second codicil, she thought she was doing the same thing as when writing the first, and making a gift additional to the will only: and to the apparent reason for repeating the legacies to the same persons may be added, if necessary, that the same person who wrote the second codicil, began to write the interlineation upon the first, and found that it would too much obliterate the first, and probably did not wish that the legacy to himself should appear in his own handwriting, but rather that it should remain in her's, without any appearance of meddling on his part. But whatsoever the reason may be (to keep clear of too remote conjectures), it is plain, that within the reason of all former determinations, there is too much evidence, that instead of intending this as additional, because there is no reason why she should make it unless for the sake of addition, there is a very distinct reason for the contrary, and that becomes much enforced by the reference to the will only, as the instrument under which *Elliott* and *Pheasant* had legacies. Therefore each is ancillary to the will only; and these legacies are not additional.

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In *Allen v. Callow* (s), *Elizabeth Metcalf*, by her will, in 1774, gave to trustees 500*l.* to be invested in the public funds, in trust to pay the interest to *E. Bousfield* for life, for her separate use, and after her death, to transfer the principal to and among all her children living at her death, the children of a deceased child to take its parent's share; and if *E. Bousfield* died without leaving issue, then to transfer the same to and among all her brothers and

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sisters living at her death; and similar legacies were given for the benefit of the two sisters of *E. Bousfield*, and their children. The testatrix made two codicils, dated in 1776 and 1780. By the former, she noticed a legacy of 500*l.* given in her will to *C. Hobbs*, and bequeathed to her trustees the *further sum* of 500*l.* upon the like trusts for the benefit of the said *C. Hobbs*, to be paid to her at such time and manner as the 500*l.* mentioned in the testatrix's will was directed to be paid to her. In the second codicil there was not any augmentation of the legacies. By a third codicil, in *May* 1785, she gave to the three children of *E. Bousfield*, then deceased, the legacy or sum of 500*l.* in the names and proportions following: 200*l.* to her daughter, *C. Bousfield*; 150*l.* to her son, *T. Bousfield*; and 150*l.* to her son, *G. Bousfield*, payable at their respective ages of twenty-one, with benefit of survivorship upon the death of any under that age; and she directed that the 500*l.* should, immediately after her death, be invested in the name of one of her trustees, to be laid out for the use of the legatees in some of the public funds, in manner and for the purpose therein mentioned. *E. Bousfield* died in *July* 1782, leaving four children, *Thomas*, *George*, *Catherine*, and *Harriet*, who were all living at the date of the will. In *December* 1782, *Harriet* died an infant, without issue; and in 1789, *Thomas* died without issue. In *April*, 1794, the testatrix died; at which time *George* and *Catherine Bousfield* were the only surviving children of *E. Bousfield*. The question was, whether they were entitled to two legacies of 500*l.* or to a single legacy of that amount only. Lord *Alvanley*, M. R., after noticing the death of *E. Bousfield* as affording reasons why the testatrix might think it necessary to alter the disposition of 500*l.* made in her favour, proceeded: "It is impossible to suppose she (the testatrix) could have meant any thing more than a distribution of that same sum, in such a manner that the whole might be enjoyed by the three children. It must not be forgot, that, though it is unequally divided, each takes a greater interest than if she had permitted the will to remain. It was ingeniously pressed for these children (and we must in these cases resort to small circumstances), that this is not a case of augmentation by the will, but by a codicil. But I cannot think that in this case that makes any difference. The presumption I raise is from this: that in the very same instrument, where she did mean additional bounty, she has said so; and when I consider the particular circumstances of this case, they are fully sufficient to rebut the general presumption. I agree fully with Lord *Thurlow*, that it is much too late to contend, that *simpliciter* legacies, given to the same person

by two instruments, bearing different dates, (for that I must always guard it with, and I hope the Ecclesiastical Court will not go on to prove papers without date), shall not be an accumulation. *Hooley v. Hatton* (t) is so fully gone into in *Ridges v. Morisson* (u), that it is not necessary to state it. It has not escaped my attention that in one of the codicils in that case, but not that upon which the question arose, the testatrix uses the words "over and above." *James v. Semmens* (x) shows how very slight circumstances will be sufficient to rebut the presumption the law makes. There the same question of double legacies arose in a Court of law. By the will, an annuity of 10*l.* was given to the wife, *Catherine Semmens*, payable yearly. By the codicil, in which are the remarkable words, 'my farther will is,' the same annuity is given out of the same estate to the same person, only payable quarterly instead of annually. I think a great deal more argument arose upon that case than can arise upon this; for my judgment is, that there is internal evidence in this will and these codicils, that the testatrix had in contemplation the different situation of the family; that they could not take the whole benefit she intended; and she sets about making another disposition more beneficial and more definite than before. Therefore I am of opinion, she meant the second disposition to be a substitution for the other. The word 'the' cannot weigh in this case; for the testatrix uses that word as to all the original legacies."

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stitutional.

Again, in the case of *Coote v. Boyd* (y), Sir *Eyre Coote*, by his will, made certain provisions for his wife, Lady *Coote*, the defendant; and gave several legacies, and directed his residuary estate to be laid out in the purchase of lands, to be settled, &c. Soon after making his will, the testator went to the *East Indies*; and in *October*, 1780, he made a codicil, by which he confirmed his will, and gave to Lady *Coote* 10,000*l.*, to be paid within twelve months after his death; he also gave several other legacies, and appointed the plaintiff, Dean *Coote*, residuary legatee. In *December*, 1780, he made another codicil, by which he gave Lady *Coote* 10,000*l.*, and repeated all the other legacies in the former codicil, in nearly the same words as were used in the former codicil; he also added a legacy of 5,000*l.* to his goddaughter *A. Monkton*, and appointed his brother, the plaintiff,

(t) *Supra*, p. 1003.

(u) *Supra*, p. 1006.

(x) 2 H. Bl. Rep. 213.

(y) 2 Bro. C. C. 521, 528.

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residuary legatee. The codicils were wrapped up together in a sheet of paper. The bill was filed by the plaintiff, as executor and residuary legatee, praying that the defendant, Lady *Coot*e, and the other legatees, might accept the legacies in the former codicil in full satisfaction of their legacies. Lord *Thurlow*, C., expressing his entire concurrence with the argument of Mr. Justice *Aston*, in *Hooley v. Hatton* (z), held that the testator meant to leave but one codicil, and only to add the legacy to Miss *Monckton* (a). His Lordship observed that it would be extraordinary the testator should repeat exactly the same legacies to persons, standing in so different degrees of relationship to him as the several legatees, and that the residuary clause should be exactly the same in both; the last codicil therefore alone ought to stand.

The case next in order is *Barclay v. Wainwright* (b); there, *Latham Arnold* having made his will on the 15th of *March*, 1777, added a codicil, dated the same day as his will, and attested by the same witnesses, wherein he gave many legacies; he afterwards made a second codicil dated 7th of *December*, 1778, entitled, "A codicil to be added to and taken as *part of the last will* and testament of me *Latham Arnold*, &c." In the second codicil, after giving additional directions respecting the carrying on of his trade, he gave equal or greater legacies to every person to whom he had given legacies by the former instrument, except such as had died, or ceased to be in that character, in respect to which he had given them legacies, and the same reason was given. There was a difference between the first and second instruments respecting legacies to *Joseph Dean* and *Miss Careless*; to the former of whom an annuity of 100*l.* was conditionally given, instead of 200*l.* sterling. A person named *Waterman* also had a legacy by the will: not any by the first codicil: but in the second a legacy was given to him *in addition* to the legacy *by the will* (c). Lord *Alvanley*, M. R., said, "There is no doubt that the second codicil is intended throughout and entirely as a substitution, and he accordingly

(z) *Supra*, p. 1003.

(a) See 4 Hare, 222, per Sir *J. Wigram*, V. C.

(b) 3 Ves. jun. 462.

(c) As to what force is to be allowed, the words "*in addition*," or

similar expressions applied in the second instrument to some of the legacies thereby given and omitted as to others, see *Russell v. Dickson*, 2 Dru. & W. 133, and *Lee v. Pain*, 4 Hare, 201, pp. 218, 233, &c.

held the second codicil a substitution for the other. At the conclusion of his decision he stated the case of *Foy v. Foy* (d), upon which he observed there never was any decree, and that, therefore, it must never be cited again.

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stitutional.

The next case is *Osborne v. The Duke of Leeds* (e). The Duke of *Leeds*, the father of the defendant, by his will, dated the 23d of *June*, 1791, devised his real and personal estate to his son and heir the defendant, then Marquis of *Carmarthen*, in fee, subject to the payment of his debts, and funeral expenses, and to a provision for the Duchess, and also subject (among other legacies), to the payment of 10,000*l.* to his son Lord *S. G. Osborne* at twenty-one, and 10,000*l.* each to all after-born children, sons at twenty-one, and daughters at twenty-one, &c., with provisions for maintenance during minorities: and he appointed the defendant the Marquis of *Carmarthen*, his executor. By a codicil in 1796, the testator bequeathed to Lord *S. G. Osborne*, all his stocks, funds, &c. in the books of the Bank of *England*, or of the *East India* or any other public company. By a second codicil, he gave some trifling legacies. He made a third codicil unattested, dated in *April*, 1798, as follows: "Whereas I have by my will given the sum of 10,000*l.* as a portion for Lord *S. G. Osborne*; and having since otherwise provided for him, I now revoke the said legacy; and give the sum of 10,000*l.* to my dear daughter Lady *Catherine A. S. Osborne*; and I do hereby declare this to be a codicil to my last will and testament." By indentures of lease and release, dated in *June*, 1797, the testator had conveyed certain hereditaments upon trust to secure Lord *S. G. Osborne* a portion of 10,000*l.* The children of the testator, at the date of the will, were the Marquis of *Carmarthen* and two daughters, respectively provided for by his first marriage, and one son, Lord *S. G. Osborne*, by his second marriage, Lady *Catherine A. S. Osborne* was born a few weeks before the date of the third codicil. The testator died 31st *January*, 1799. The only stock standing in his name at his death was about 3,000*l.* *India stock*: Upon the bill filed by the two younger children against the executor, the question arose upon the claim of Lady *Catherine A. S. Osborne* to two legacies of 10,000*l.* In opposition to that claim the Duke of *Leeds* offered parol evidence upon the subject of the provision of the younger children. The Duchess of *Leeds* deposed, that

(d) 1 Bro. C. C. 393, note; 1 minute books, but this case is not to
Cor's cases, 163. The Editor has be found in either.
searched the Register's entry and (e) 5 Ves. 369.

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by second in-
strument sub-
stitutional.

five weeks after the birth of Lady *Catherine*, the late Duke had informed her he had made a provision of 10,000*l.* for her. Other evidence was adduced in proof of the testator's intention, in opposition to the claim of the double legacy. There were two questions, first, whether Lady *Catherine* was entitled to *two* legacies of 10,000*l.*, or to *one* only. Lord *Alvanley*, M. R., said, that he had satisfied himself that upon the true construction of the will and codicil, and the circumstances under which they were made, there was no necessity to resort to evidence, to support the construction of the executor; being of opinion, that the legacy, according to the true construction of the will and codicil, was not to be held accumulative, but only a gift of the same portion and provision by the testator to his daughter by name, to which before she was entitled under the description of after-born children. Being of that opinion, it was for him to say little upon the evidence, which he should have found great difficulty in admitting. His Lordship, in a subsequent part of his judgment, gave his reasons for considering the internal evidence of the instrument and the circumstances conclusive against the duplication of the legacy, and concluded by citing the case of *Heathcote v. Heathcote*, as in point.

Next in order to the case of *Currie v. Pye*, before stated (*f*), is the case of *Attorney General v. Harley* (*g*). The testatrix, *Ann Newton*, executed three testamentary papers, by the last of which she gave legacies to the same persons as were objects of her bounty in the first paper, and in most instances to the same amount, and under similar qualifications. In the first was the following bequest: "To *Martha Harley* (whom the testatrix appointed executrix) for attending during her life and seeing all these directions executed during her life; and by her last will and testament ordering the same to be done by her executors, 1,000*l.*" In the third testamentary paper were these words; "To *Martha Harley*, tax deducted out of my property, 1,000*l.* and by this paper the testatrix appointed *Martha Harley* executrix." The cause came on upon exceptions to the Master's report, who had reported *Martha Harley* and other legatees entitled to double portions. Eight exceptions were taken. The other exceptions were decided upon the same ground as the first exception, which was, that the Master ought to have certified, that according to the true construction of the will, the latter only of the legacies to *Martha Harley* was payable. In support of the

(*f*) *Supra*, p. 1001; 17 Ves. 462.

(*g*) 4 Mad. 263.

exceptions, the cases below (*h*) were cited. Sir *John Leach*, V. C., delivered the following opinion: "If the legacies to Mrs. *Harley* were alone to be considered, she would be plainly entitled to both; but the question here, is, whether the third instrument does not afford internal evidence, that it was meant by the testatrix, not as an addition to the first instrument, but as a substitution for it. It begins with all the forms of the first instrument, with the same expressions of religious resignation, nearly in the same words; it then proceeds to appoint *Martha Harley* her sole executrix, by the same description as in the first instrument; and it then proceeds to give, with little variation, the same legacies, to the same persons, who were the objects of her bounty by the first instrument. I think the inference irresistible, that the testatrix intended the third instrument as a substitution for the first, and that, therefore, Mrs. *Harley* must take the unconditional legacy of 1,000*l.* given by the third instrument, in the place of the conditional legacy given by the first." The exception was allowed. To the preceding class, the cases cited in the note (*i*) may be added.

Where legacies by second instrument substitutional.

SECT. V. On the admissibility of *parol* evidence to rebut the presumption in favour of the accumulative legacies.

We proceed, in the last place, to inquire, how far *parol evidence* is admissible, to rebut the presumption in favour of the second legacy being accumulative; and it seems now settled, that it is not admissible.

How far *parol evidence* admissible to rebut presumptions for or against double legacies.

In the case of *Osborne v. The Duke of Leeds* (*h*), the question was fully argued; but Lord *Alvanley* avoided giving a decision, as the case did not require it. He, however, in the course of his judgment, said, that he should have had great difficulty in admitting it. His Lordship is reported to have expressed himself in the following words: It does appear most clearly, if the report

(*h*) *Garth v. Meyrick*, *Ridges v. Morrison*, *Hooley v. Hatton*, *Coots v. Boyd*, and *Benyon v. Benyon*, *supra*.

(*i*) *Gillespie v. Alexander*, 2 Sim. & Sta. 145; *Hemming v. Gurspey*, Ib. 311; 1 Dow. N. S. 35; 1 Bligh, N. S. 479; *Fraser v. Byng*, 1 Rus. & M. 90, and *Mad. & Geld. 303*, *in notis*; *Graves v. Hicks*, 6 Sim. 391; *Robley*

v. Robley, 2 Beav. 95; *Kidd v. North*, 14 Sim. 463; *aff. 2 Phil. 91*; *Martin v. Drinkwater*, 2 Beav. 215; *Bristow v. Bristow*, 5 Ib. 289; *Walsh v. Gladstone*, 1 Phil. 294; *Russell v. Dickson*, 2 Dru. & W. 133; *Lee v. Pain*, 4 Hare, 201, 238, &c.

(*h*) 5 Ves. 369, 380, *supra*, p. 1021.

How far parol evidence admissible to rebut presumption for or against double legacies.

is right, that Lord *Thurlow*, in *Cooté v. Boyd* (l), thought it admissible on either side (m). His Lordship did admit it upon that side, upon which, if this plaintiff is right, it was not necessary; for it is contended, that it is an established rule, taken from the Spiritual Court, that two legacies are accumulative, if given by two instruments. If that is a rule, I admit, I cannot raise a presumption by evidence against it; and I am inclined ^{to think} it must be taken to be a rule. But in *Hooley v. Hatton* (n), from which that is taken, the authorities, from which that rule is deduced, had no idea but that evidence is admissible; and it is stated by the writers upon the Civil Law, that the legacies shall be accumulative, if by two instruments, unless the executor can shew evidence to the contrary. If it is taken as a rule of this Court, it would be a violation of it to admit evidence to raise a presumption against it. I should, therefore, if it is taken as a rule in this Court, be very unwilling to let in evidence against it, first for the executor. It was taken for granted in many cases, and even in *Hooley v. Hatton*, that it would be admissible; and in *James v. Semmens* (o), it seems from one passage in the report, as if the Court doubted, whether parol evidence would not have been admissible."

The question came before Sir *John Leach*, V. C., and called for a decision in *Hurst v. Beach*, before stated (p). It was the subject of the second question in the cause, viz. How far parol evidence was admissible to prove, that the testatrix meant the legacy of 500*l.* given by the codicil to *John Beach*, as a substitution of that of 300*l.* given by the will: a case was ordered by the Vice Chancellor to be sent for the opinion of two civilians; and he observed, "If the case is not determined by decision in the Ecclesiastical Court, I must determine it by the principles of this." A case was accordingly sent to Dr. *Swabey* and Dr. *Lushington*; in answer to which, they stated, they were not aware that the point had ever received any decision in their Courts, nor indeed been the subject of discussion.

Upon the questions thus submitted, and the opinions being read, his Honor, after disposing of the first question in the words before given (q), further expressed his opinion thus: "Upon

(l) *Supra*, p. 1019.

(m) Also in *Ridges v. Morrison*, *supra*, p. 1006.

(n) *Supra*, p. 1008.

(o) 2 H. Bl. 213.

(p) *Supra*, p. 1007; 5 Mad. 351; see *Hall v. Hill*, 1 Dru. & W. 94; *Lee v. Pain*, 4 Hare, 201, 216.

(q) *Supra*, p. 1007.

the question, whether evidence is admissible to prove that the testatrix did not mean that the defendant should take both sums, there are no decisions in the Courts of Equity. There are *obiter dicta* for the admission of such testimony; but in *The Duke of Leeds v. Osborne*, the point was fully argued, and Lord *Alvanley* appears to have inclined against receiving it. It did not, however, become necessary there to decide the question. It is to be collected from the Digest, that it was admitted by the Civil law. This Court has no original jurisdiction in testamentary matters; it acts with respect to them only upon the ground of administering a trust; and is bound to adopt in questions of legacy the principles and rules of the Ecclesiastical Court. I found it necessary, therefore, to direct inquiry to be made in that Court upon this point, and the answer that I have received is, that no decision has taken place there upon this question, and that no settled opinion is formed upon it. It remains then to be considered upon the principles of evidence, which are received in our own law. Our primary principle is, that evidence is not admissible to contradict a written instrument. In some cases Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, and there they will receive evidence to repel the presumption: for the effect of such testimony is not to show that the testator did not mean what he has said, but on the contrary, to prove that he did mean what he has expressed. Thus, where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner evidence is received to repel the presumption raised against an executor's title to the residue, from the circumstance of a legacy given to him, and to repel the presumption that a portion is satisfied by a legacy. In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it. Here the evidence tendered is not in support of the apparent effect of the instrument, but directly against it. This codicil leaves unrevoked the former legacy of 300*l.* to the defendant, and makes to him a further substantive gift of 500*l.* The evidence tendered is, that the testatrix did not mean this as a further gift of 500*l.* but meant to substitute the 500*l.* in the place of the former 300*l.* I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible *against* the *expressed* effect of a written instrument."

How far parol evidence admissible to rebut presumption for or against double legacies.

How far parol evidence admissible to rebut presumption for or against double legacies.

In *Martin v. Drinkwater* (r), a case of substitutional legacy, Lord Langdale, M. R., has stated the rule upon the admissibility of parol evidence. "I consider the rule as settled; you are at liberty to prove the circumstances of the testator, so far as to enable the Court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions."

CHAPTER XVII.

Of the satisfaction and release of Debts by Legacies.

WHERE a person *indebted* bequeaths to his *creditor* a legacy equal to or exceeding the amount of the debt, which is not noticed in the will, the Courts of Equity, in the absence of any intimation of a contrary intention, have adopted the rule, that the testator shall be presumed to have meant the legacy as a satisfaction of the debt. This rule, however, though long well established, has frequently been disapproved, upon the ground that a satisfactory reason cannot be assigned, why the testator should not have intended a benefit to his creditor beyond the amount of his debt, in those cases where there has not been a deficiency of assets. Consequently, a strong disposition in the Court has been repeatedly evinced to form exceptions, where the nature of the gift, or other circumstances attending it, have furnished grounds for inferring an intention on the part of the testator, contrary to that assumed by the rule. But where, on the other hand, a *creditor* bequeaths a legacy to his *debtor*, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the securities are found uncanceled among the testator's effects, the Courts of Equity do not consider such legacy as necessarily, or even *prima facie*, a release or extinguishment of the debt; but requires evidence clearly expressive of the intention to release the debt: and if such intention do not appear clearly expressed or implied on the face of the will, evidence from other sources will be admitted to prove the release of the debt. The subject of these preliminary observations will be discussed in the present chapter, under the following heads:

SECT. I. Where the legacy operates as a satisfaction of the debt *due by the testator to the creditor-legatee.*

- 1.—*When the legacy is given simpliciter, and is of the same nature as the debt, and of equal or greater amount.*
- 2.—*Where it operates as a performance of a covenant.*

SECT. II. Where the legacy has *not* been deemed a satisfaction of the debt.

- 1.—*Where the legacy is of less amount.*
- 2.—*Where a difference is made in the time of payment of the legacy and that of the debt.*
- 3.—*Where of a different nature, either—*
 - A.—*As to the subject itself,—or*
 - B.—*As to the interest given.*
- 4.—*Where, though of the same nature, a particular motive is assigned for the gift.*
- 5.—*Where the debt is contracted subsequently to the making of the will.*
- 6.—*Where the legacy is contingent or uncertain.*
- 7.—*Where the debt is contingent or uncertain.*
- 8.—*Where there is an express direction in the will for the payment of debts.*

SECT. III. Inquiry how far the doctrine of satisfaction is affected by the relation subsisting between the testator and the creditor-legatee.

- 1.—*Where the legatee is a servant, and herein, of the admissibility of parol evidence.*
- 2.—*Where the legatee is a child, and herein, the distinction between a legacy and an advancement of a portion by the parent.*

SECT. IV. Where a legacy by a creditor to his debtor-legatee does or does not operate as a release or extinguishment of the legatee's debt,—and herein of the effect of appointing a debtor executor.

Where legacy
by debtor to his
creditor is a
satisfaction of
his debt.

SECT. I. Where the legacy operates as a satisfaction
of the debt *due by the testator to the creditor-
legatee.*

When legacy
given *simplici-
ter*, of same
nature, and
equal or greater
in amount than
debt.

1. When a testator being indebted bequeaths to his creditor a legacy, *simpliciter*, and of the same nature as the debt, and not coming within the other exceptions stated in the second section of this chapter, it has been held a satisfaction of the debt, when the legacy is *equal* to or exceeds the amount of the debt.

Thus in *Brown v. Dawson (a)*, *Henry Dawson* prevailed on his wife to join with him in selling 7*l.* 10*s.* *per annum* of her jointure, and afterwards 6*l.* 10*s.* *per annum* more. *Henry Dawson*, having given two notes, that his executors should pay her those two sums during life, made his will, and gave her 14*l.* *per annum* for life, and the Court held that the bequest was a satisfaction of the notes.

So in *Fowler v. Fowler (b)*, where the legacy exceeded the debt: the deceased husband of the defendant, by settlement before the marriage, settled 100*l.* *per annum* in trust for her separate use, for pin money. Two years arrears having become due, the husband made his will, and, after expressing great affection for his wife, gave her a legacy of 500*l.* After the making of the will, another year's arrear was incurred, and then the husband died. The question was, whether the 500*l.* legacy, being more than what was due for pin money, should be deemed a satisfaction for the arrears? *First*, it was admitted by Lord *Talbot*, C., to have been the general practice, that where there was a debt due from the testator to a third person, and the legacy given to such person was as much or more than the debt, such legacy should be a satisfaction of the debt. That this being established as a rule, it would be of very ill consequence to unsettle or alter it, because no counsel would know how to advise his client; though, had it been *res integra*, his Lordship said he would hardly come into it. That it had been urged with great reason, in opposition to the maxim, "that a man ought to be just before he was bountiful," that where there were assets, the testator might, with as much reason, be construed both just and bountiful. *Secondly*, that although in some cases, *parol evidence* had been allowed, to show that the testator intended to give such legacy exclusive of the debt, yet his Lordship's opinion was, not to admit such evidence, for then the witnesses and not the

(a) Pre. Chan. 240.

(b) 3 P. Wms. 353.

testator, would be makers of the will (c). *Thirdly*, that such being the general rule, and no precedent adduced to show that the case of a wife was an exception to it, his Lordship thought that the legacy given to her, being larger than the debt, ought to be considered a satisfaction of it: But *fourthly*, that the legacy could not be pretended to be a satisfaction of a debt incurred *after the date of the will*, and which at that time might possibly never become due.

Where legacy by debtor to his creditor is a satisfaction of the debt.

When legacy given *simpliciter*, of same nature, and equal or greater in amount than debt.

So also in *Gaynon v. Wood* (d), the testator, by his will, gave to the plaintiff, *Ann Foley*, the wife of the plaintiff *Gaynon*, 500*l.* then 500*l.* to charity, and appointed *Griffiths* and *Wood* executors. After making his will, the testator contracted debts with the plaintiff *Ann*, and gave her his bond for securing 200*l.* By a codicil he revoked the charity legacy of 500*l.* and gave the said legacy to the plaintiff *Ann*, over and above the 500*l.* given to her by the will, and also gave to her all his ready money and bank bills, and did not dispose of the residue. The defendant *Griffiths* renounced; *Wood* alone proved the will, and possessed the personal estate, and paid the bond debt to the plaintiff *Ann*. The bill was filed by the plaintiff for payment of the two legacies. The defendants insisted, that the legacy given by the codicil was a satisfaction of the debt of 200*l.* due by bond to the plaintiff *Ann*. The question was, whether the rule of satisfaction took place, or whether there was any consideration to take it out of the general rule? Sir *Thomas Clarke*, Master of the Rolls said, that the general rule, though admitted to have long prevailed, had not escaped censure. When all creditors and legatees were by the will directed to be paid, if the personal estate were not sufficient, they were to be paid *pari passu* till the time of Lord *Nottingham*, C., when he declared, that a testator must be supposed just before he was bountiful, and therefore directed the creditors to be paid, and if the personal estate were not sufficient, the legatees were to abate. The bequest of the 500*l.* by the codicil must be taken as an original bequest, that there was nothing in that case that took it out of the general rule, and as to the defendant's having paid the debt, it made no difference. That the defendant must have an allowance out of the plaintiff's legacy of what he paid for the debt: and the decree was, that

(c) *Sed vide Pole v. Lord Somers*, and the observations there upon the admission of evidence, 6 Ves. 321.

(d) 1 Dick. 331; also 1 Ves. sen.

123, 125, *Bell's* edition; 2 P. Wms. 130; Prec. Chan. 394, and *Graham v. Graham*, *infra*, p. 1031; *Stroud v. Stroud*, 7 Man. & Gr. 417.

Where legacy by debtor to his creditor is a satisfaction of the debt.

the legacy of 500*L*. given to the plaintiff *Ann* by the codicil, was to be considered and deemed a satisfaction of the bond for 200*L*. given by the testator to the plaintiff (*e*).

When legacy a performance of a covenant.

2. Where the legacy operates as a *performance of a covenant*.

This is illustrated in the case of *Wathen v. Smith* (*f*), which in some respects is a new case. There *J. Wathen*, in his marriage settlement, covenanted that his heirs, &c., should pay to his intended wife, *Elizabeth* 1,000*L*. *within six calendar months after his decease*, for her own use and benefit. The marriage took effect, and *J. Wathen*, by his will, gave his wife *Elizabeth* 1,000*L*. to be paid to her *within three calendar months* after his decease, for her own use and benefit; the testator also bequeathed to his wife several specific legacies, and also the interest of the residue of his estate to her for life, &c. He also directed all his just debts, &c. to be paid: and Sir *Thomas Plumer*, M. R., decided that the legacy was a satisfaction of the covenant; observing, that the case was one of intention, but the intention to perform the covenant was to be presumed, unless there were special circumstances to repel that presumption. His Honor thought that *Chancey's* case (*g*) did not apply there; and that the provision for the wife by the settlement was not a *debt* within the sense in which the testator must be understood to use the word "debts" in his will. His Honor also distinguished the present from the case of *Haynes v. Mico* (*h*).

SECT. II. Where the legacy has *not* been deemed a satisfaction of the debt.

Where legacy by a debtor to his creditor *not* a satisfaction of the debt.

From the rule itself, as illustrated by the cases detailed and referred to in the first section, we next proceed to consider its exceptions, from the number of which we may easily account for the small proportion of those establishing the rule.

Where of less amount than the debt.

1. And *first* it may be deemed settled, that where the legacy is of *less* amount than the debt, it shall not be deemed a part payment or satisfaction.

(*e*) See *Graham v. Graham*, next page.

(*f*) 4 Mad. 325.

(*g*) 1 P. Wms. 408, *infra*, and see Mr. Cox's note.

(*h*) 1 Bro. C. C. 129, *infra*, p. 1036, see also *Jones v. Morgan*, 2 Yo.

& Coll. (E.), 403, in which a covenant in a settlement on the first marriage for payment of portions was held satisfied by a provision for their payment, made by the settlement on a second marriage.

Thus in *Gofton v. Mills* (i), the testator bequeathed to B. 400*l.* in full satisfaction of all he could claim from him, and charges his real estate with the payment of his debts. The debt which the testator owed B., with an arrear of interest, amounted to 800*l.*, but was barred by the Statute of Limitations. The Lords Commissioners held the land liable to the whole debt.

Where legacy by a debtor to his creditor not a satisfaction of the debt.

When of less amount than debt.

Again, in *Graham v. Graham* (j), the plaintiff claimed three annuities given by her husband's father: the first a grant by deed of 10*l. per annum* for a term of ninety-nine years, on condition that she maintained her son, and which was charged on a particular estate; the second of 6*l. per annum*, during her widowhood, given by bond; the third by *his will*, of 10*l. per annum* charged generally. Lord *Hardwicke*, C., observed; "The question is, whether the latter annuity can be considered as a satisfaction for either of the other two granted in his life? For both together amounting to 16*l. per annum*, that being but 10*l. per annum*, cannot be a satisfaction; nor can it be for the 10*l.* annuity granted by deed; although there are several cases in which the Court leans against double provisions on the foot of parity between them. Though it is voluntary in respect of his grandson, it is not so in respect of his daughter-in-law, who being by agreement to maintain her infant son for it, otherwise to cease, is considered as a purchaser; and the grandson would have a right to come into equity by *prochein amy*, for maintenance thereout. As to the 6*l.* annuity, which was nothing but a debt on his estate, I think the last will be a satisfaction for it; for the person so indebted gives by his will a better annuity, which falls within all the rules established of satisfactions. If it were a bond for payment of a gross sum, and he gave an equal or larger sum by his will, it would certainly be a satisfaction. I do believe the intent was, as has been said for the plaintiff, to increase his bounty; and he has done it, by giving an additional 10*l. per annum* to the first 10*l.* As to what was further said (that the Court will not hold what is given by a will, a satisfaction for either, where several things are given before), there might be a great deal in it; and therefore if he were chargeable with two, and devised an annuity equal to one, I should not have thought it a satisfaction for either; but it should accumulate. But he was not a general debtor for both, only for the 6*l.* annuity; having granted the 10*l.* annuity by way of charge on a particular estate, and really for

(i) Prec. in Ch. 9; S. C. 2 Vern. Eq. Ca. Ab. 355.
141; see also *Stannay v. Styles*, 2 (j) 1 Ves. sen. 263.

Where legacy by a debtor to his creditor not a satisfaction of the debt. the benefit of the grandson; so that he was debtor only for the other; and having given a higher, it cannot be distinguished from the cases of satisfaction."

Where time of payment different.

2. The next *exception* is where, though the debt and legacy are of *equal* amount, there is a difference in the *times of payment*, so that the legacy may not be equally beneficial to the legatee, as the debt.

Thus in *Atkinson v. Webb* (*k*), the wife of the plaintiff, having served Lady *Pratt* twenty-five years as chambermaid, and being much in her favour, and having married the plaintiff by Lady *Pratt's* encouragement, Lady *Pratt* gave her a bond for 300*l.* conditioned to pay her and her husband 20*l. per annum* during their lives, and the life of the survivor, payable *quarterly* at Sir *Francis Child's* shop, free from all deductions. About five years afterwards, Lady *Pratt* bequeathed annuities to several persons, in satisfaction of the like annuities secured by bond, and gave 20*l. per annum* to the plaintiff's wife, to be paid *half-yearly* at Lady *Pratt's* mansion house, chargeable on such lands, &c. : but took no notice of the 20*l. per annum*, secured to her by bond. Upon the circumstances of the case, the Court declared that the plaintiff's wife was entitled to both the annuities, because that given by the will was not so advantageous to her as the other, the one being to be paid *quarterly*, the other *half-yearly*; the one here, the other on the land; one free from all deductions; the other liable to taxes, as being charged upon lands; and a devise implied a bounty, that the annuities which were intended in satisfaction of the like annuities, were so declared in the will, which this was not.

So in the case of *Nicholls v. Judson* (*l*), *William Lowe*, in order to reward the good services of *Ann Mansell*, who had lived with him a great number of years, gave her a bond in 1728, for payment of 300*l.* and interest, upon a certain day; and in 1731 paid her 100*l.*, part of the 300*l.*, and all interest. In 1736, he by his will gave to trustees, all his messuages, lands, &c. situate, &c. for two hundred years, upon trust to raise and pay to *Ann Mansell*, *within two years after his death*, 200*l.*; and subject to the term, he devised the same premises to the plaintiff in fee. He also devised other lands to the same trustee for three hundred years, upon trust to pay 200*l.* to *Ann Mansell*, *within one year after his death*; in other parts of his will he gave her plate, linen,

(*k*) Prec. Chan. 236.

(*l*) 2 Atk. 300.

&c. and other personal legacies. The executors of the testator paid part of the bond debt to *Ann* during her life. The prayer of the bill was, that the legacies to *Ann Mansell* might be decreed a satisfaction of the bond, and that the defendant, her executor, might refund such sums as he had received in part payment of the debt from the executors. The Master of the Rolls said, "And though the general rule is, that a legacy which is greater, or as great, as the debt, shall be taken to be a satisfaction, and is too well established to be shaken now; yet, in late cases, where there are circumstances, or a presumption that the testator's intention was not that the legacy should be an ademption of the debt, the Court has leant against the rule, so far as to hold it not to be a satisfaction. So, in the present case, the testator's directing that the 200*l.* and 200*l.* should not be paid *till one or two years after his death*, is a very considerable circumstance in favour of *Mrs. Mansell*, and shows strongly, that the intent of the testator was not that it should go in satisfaction of the debt; for the bond was payable *immediately*, and the testator had no right to suspend the payment of a debt, though he might suspend his legacy: and though executors have a year allowed them to pay legacies, yet that does not extend to debts, but they are liable to be sued the moment after the testator's death; so that the payment of these legacies at a future time is extremely material, and takes this case out of the general rule. Besides too, I am inclined to think this is a *contingent* legacy; for the trustees being directed to pay it within two years and one year, does not oblige them to pay it sooner; and if the legatee had died before the time of payment, it would have sunk in the land, for the benefit of the plaintiff, according to the settled rule of this Court, with regard to legacies charged upon land: and as the rule of ademption has never been carried so far, as to take in a *contingent* legacy, I must decree for the defendant, that the devise of the 200*l.* and 200*l.* is not a satisfaction of the bond.

Where legacy by a debtor to his creditor not a satisfaction of the debt.

When time of payment different.

Again in the case of *Mathews v. Mathews* (*m*), Admiral *Mathews* had, upon his marriage, settled a real estate of 300*l.* a year, in strict settlement, so as to make his first son tenant in tail. Afterwards, by deed in 1733, which was an agreement between the father and son, upon the marriage of the latter, by which the father agreed to take 800*l.*, part of the fortune of the son's wife, and to make a settlement to this effect; that, in consideration of the 800*l.* he should within one month afterwards, convey to trustees

Where legacy
by a debtor to
his creditor not
a satisfaction of
the debt.

When time of
payment dif-
ferent.

for a term of years certain lands, to secure 50*l.* a year to the son, and 800*l.* to the younger children of the son, to be paid at such days, times, manners and portions as the son should appoint, and in default thereof, to be paid to them equally at *twenty-one*, or marriage, with benefit of survivorship among them; and if he had no child, the 800*l.* was not to be raised. Admiral *Mathews*, by his will in 1749, divided 700*l.* *per annum* to his son, upon condition that the son, within twelve months after the testator's death, should convey the whole family estate, for better securing to the testator's sister-in-law *A. B.* 100*l.* *per annum* for life, which he had before given her out of the lands, and on condition that the son should confirm the will, otherwise the 700*l.* annuity was to cease: and the testator also made a very large provision for his grandchildren at their *ages* of *twenty-five*, or marriage. One of the questions was, whether, as the provision for the grandchildren by the will considerably exceeded that by the settlement, the provision under the will was not a satisfaction of the 800*l.* in the settlement? Sir *Thomas Clarke*, Master of the Rolls, observed, "The deed in 1733, was a contract between father and son, so as to make the son and his family purchasers from the father, and created a debt owing from the father to them. As to the wife, she has clearly received no satisfaction for that debt contracted to her. As to the children, the rules of satisfaction are well settled and known; and it is strange, how that general rule came to be established; that is, where a debtor by his will gives a larger or equal benefit, it is extraordinary to say, that if the estate is sufficient for both debt and bounty, the testator, upon the rule of constructive satisfaction, should not intend both. However, that rule has been so settled, and not broke in upon: yet the Court dislikes it so much, as to lay hold of any minute circumstance to take it out: as that the thing in satisfaction should be as certain as to the duration and commencement of it, otherwise, though ten times larger given by the will, it will not be held a satisfaction. I remember a case before the Lord Chancellor, where an old lady, indebted to a servant for wages, by will gave ten times as much as she owed, or was likely to owe; yet, because made payable in a month after her own death, so that the servant might not outlive the month, although great odds the other way, the Court laid hold of that. By the articles in 1733, the children were entitled to 800*l.*, so as that every child must have had part of it. By the will, he has given twenty times as much in the whole among them: but then it is so given them, that if they do not arrive at twenty-five years of age, or do

not marry, they would be entitled to nothing. It falls not within the rules of satisfaction, to which the Court has adhered; and it is too much to say, the children are not entitled to both."

Where legacy by a debtor to his creditor *not* a satisfaction of the debt.

When time of payment different.

Again, in the case of *Clark v. Sewell* (n), *Edward Godfrey* bequeathed 2,000*l.* to trustees, to pay the interest to his wife for life, and after her death, the benefit of the principal to his son; but if he died under the age of twenty-one, then he gave it to his daughters, and made the defendant and two other persons executors. The son attained twenty-one, and became entitled to the 2,000*l.* The executors were directed by the will to carry on the testator's trade of a brewer, so that they permitted the 2,000*l.*, as well as the rest of the estate, to continue in the trade. The son, after he had attained twenty-one, still carried on the trade on the foot of the same stock which was left by his father. The son afterwards made his will, without reference to that of his father, and gave a legacy of 10,000*l.* upon trusts different from those his father had limited of the 2,000*l.*; for, after the interest of the 10,000*l.* to his mother for life, he gave the principal to his sister *Sewell's* children, and charged it upon all his real and personal estate, and to be paid to trustees *in a month after his death*. The son died soon afterwards, and the plaintiff, as devisee of the mother, claimed the interest of the 2,000*l.*, as well as the interest of the 10,000*l.*: and Lord *Hardwicke*, C., observed: "The consequence of the son's carrying on the trade with his father's stock was, that the 2,000*l.* was a debt due upon his father's estate in his hands, or more directly and properly a demand upon his father's executors. There is no pretence to say, that the principal of the 10,000*l.* can be a satisfaction of the principal sum of 2,000*l.* to the mother, nor is there any thing in the will that declares this to be a satisfaction of the interest of the 2,000*l.* But the point of time, it is said, is so trifling, it being only a month, that no regard should be paid to it; but though a small one, yet it is a circumstance the plaintiff has a right to lay hold of, to take this out of the cases which have been deemed a satisfaction; for, according to the rule of this Court, a legacy that ought to be deemed a satisfaction must take place immediately after the death of the testator: for the debt, whether of a principal sum or for interest, is due at the death of the testator, and therefore the legacy must be so too." His Lordship decreed, that the 2,000*l.* must be considered as a debt, and the

Where legacy
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the debt.

When time of
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legacy of the interest of 10,000*l.* was no satisfaction of the interest of the 2,000*l.*

In the case of *Haynes v. Mico* (o), upon the marriage of *James* and *Susannah Mico*, in 1743, the husband gave a bond to trustees in 600*l.*, conditioned to leave to the wife 300*l.* (being the wife's fortune), payable in a month after his death, in case she survived him. After the marriage, the husband settled a house to the use of himself for life, remainder to his wife for life, which, together with the 300*l.*, was to be in bar of dower. By his will, he gave to his wife 500*l.* payable within six months after his decease; also a house in fee, the house in which they lived for life, and several other specific legacies; and died in 1773. In 1776, the wife died; and her will being litigated in the Ecclesiastical Court, occasioned the delay in bringing this suit, which was instituted by the wife's representatives against the nephew and residuary legatee of *James*, for the two sums of 500*l.* and 300*l.*; the sole question being, whether the legacy of 500*l.* was or was not a satisfaction of the 300*l.* secured by the bond. Lord *Thurlow*, C., decreed in favour of the plaintiff, that this legacy was not a satisfaction of the 300*l.* secured by the bond: and his Lordship is reported to have considered the subject first in the light of a debt, and held that, so considered, the legacy could not be deemed a satisfaction; the debt being payable in one month, the legacy in six (p).

The present exception is further illustrated by the case of *Jeacock v. Falkener* (q). In that case, *Thomas Crowder*, in 1764, gave a bond to trustees, reciting that he was desirous of providing for *Thomas Crowder*, his natural son, then about four years old, and conditioned that his executors should, six months after his decease, pay the sum of 5,000*l.* to the trustees for the use of *Thomas Crowder*, the interest to be applied for his maintenance and education till twenty-one, and the principal then to be paid to him; but if he should die, living the father, or under twenty-one, then not to be paid. In 1778, *Thomas Crowder*, the father, made his will, and gave the defendants, the trustees, all his estates in trust to pay legacies, and to lay out 15,000*l.* on securities, and to apply 200*l.* per annum to the education of *Thomas Crowder*, the son, till twenty-five, and then to pay him

(o) 1 Bro. C. C. 129.

(p) See Sir *Thomas Plumer's* re-

marks on the above case, 1 Swan. 219, 221.

(q) 1 Bro. C. C. 295.

the 15,000*l.*; but if he should marry between twenty-two and twenty-five, and should die, to pay the whole to the issue; and if he died unmarried before twenty-five, he gave the whole over; the residue, so far as 15,000*l.* to *Caleb Jeacock* for life, with remainder to his children; but if the residue exceeded 15,000*l.*, then half the surplus to go to *Thomas Crowder*, the other half to *Jeacock*. The bill was filed by *Jeacock*, praying that the legacy given to *Thomas Crowder* by the will might be declared to be in satisfaction of the sum secured by bond: and evidence was offered on the part of the plaintiff, to prove a conversation between the testator and one of the parties. But the evidence was rejected, and Lord *Thurlow*, C., observed, that the testator chose to give the legacy to the child, until he should be twenty-five years of age; but he gave it over as effectually, if he died without issue between twenty-one and twenty-two, as if he died before twenty-one. The intent of the testator, collected on fair grounds, that the party should not have both, was the only ground on which such a decree as was required could be made. The bond there was not satisfied by the legacy; the 15,000*l.* must be applied to the trusts of the will. This decree was afterwards confirmed, upon a rehearing, by Lords Commissioners *Loughborough*, *Ashurst*, and *Hotham*.

Where legacy by a debtor to his creditor not a satisfaction of the debt.

When time of payment different.

In the case of *Adams v. Lavender* (q), in the Exchequer, *Richard Adams*, in pursuance of a bond, entered into previously to his marriage with *Mary Adams*, executed a second bond to trustees, to pay to them in his lifetime, or immediately after his decease, 500*l.*; the trusts of which were for *Richard Adams* for his life; and immediately after his decease, for his wife for life; and after their deaths, for the children of their marriage; and if no issue, for the survivor of the said *Richard Adams* and *Mary* his wife; subject to the payment of expenses incident to the execution of the trust. By his will, *R. Adams*, after directing that "all his just debts should be fully paid," gave to the defendant, *Lavender*, and another, (among other things), his household goods, furniture, &c., upon trust for his wife for life. He also gave to the same trustees all his monies in funds, upon trust to raise and pay thereout 1,000*l.* sterling to his wife, within six calendar months after his decease, for her own absolute benefit. The testator also gave a leasehold house, and the residue of his personal estate, in trust for his wife for life. He died without

(q) 1 M'Clel. & Y. 41; see also *Goldsmid v. Goldsmid*, 1 Swan. 219.

Where legacy
by a debtor to
his creditor not
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the debt.

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having issue by his wife, to whom the 1,000*l.* was paid: and upon her bill for the payment of the 500*l.* also, the question was, whether the 1,000*l.* was a satisfaction of the 500*l.* secured by the bond. *Alexander, C. B.*, decided, that the widow was entitled to the legacy, and the debt likewise: and after observing that he did not consider the case of *Haynes v. Mico* (*r*) overruled, as stated at the Bar, said, that he thought the case before him was much stronger than that, for these reasons: that, besides the circumstance that the legacy given by the will was payable six months after the death of the husband, while the sum secured by the bond was payable in his lifetime, or immediately after his decease, this case included both the grounds of decision relied on by Lord *Kenyon*, in *Devese v. Pontet* (*s*); viz. the direction that all just debts should be fully paid; and the circumstance that there might have been other persons than the wife to a great extent interested in the bond debt, if the testator had had children between his will and his death; or if his widow had been *enceinte* at his death (*t*). His Lordship also observed, that the trustees were interested likewise in respect of their right to be reimbursed the expenses of the trust.

In *Foster v. Evans* (*u*), the father, on the marriage of his daughter, and the husband gave bonds for 3,000*l.* each to the trustees, upon the trusts of the settlement; the father by his will gave 3,000*l.* to the trustees of his will to invest in Government or real securities, and stand possessed of the trust funds, upon the same trusts for the benefit of his daughter, her husband and their issue, as by the marriage settlement were “expressed and declared of the *said* trust monies, stocks, funds and securities comprised in such settlement.” At the death of the father, the principal and some of the interest were due on his bond. Upon the question, whether the legacy of the 3,000*l.* was a satisfaction of the bond. Sir *Lancelot Shadwell, V. C.*, decided in the negative, expressing his opinion that it appeared on the face of the will, that the testator did not intend the legacy should be a satisfaction of the bond; as the settlement was clearly in his recollection when he made his will; and that if he had intended the bequest to be a satisfaction of his bond, he would have so declared.

It is open to observation that this inference is not necessary;

(*r*) *Supra*, p. 1036.

(*s*) *Infra*, p. 1048.

(*t*) See *Wright v. Fearris*, 3 Swan. 681.

(*u*) 6 Sim. 15.

and that there is ground to contend that by bequeathing the same amount as that for which his bond was given, (though that of itself is not a sufficient indication of intention), and for the same purposes, and by mentioning the settlement monies (not before noticed in the will) as "*said* trust monies," &c., the testator intended the legacy as a satisfaction. The word *said* is not reported to have been adverted to in the argument, or in the judgment; but as the will does not previously mention the settlement monies there is no meaning in the word "*said* trust monies" unless the testator considered himself, as giving the identical sum by the will he was under obligation to give by his bond, and, therefore, by him called '*said*' settlement monies, and that he was substituting the sum given by the will in lieu and satisfaction of that secured by his bond.

Where legacy by a debtor to his creditor not a satisfaction of the debt.

When time of payment different.

In the later case of *Hales v. Darell* (v), the testator had for valuable consideration granted to his two sisters annuities of 300*l.* a year each during their lives payable in *January, April, July* and *October*. By his will he gave his widow an annuity in lieu of an annual sum payable to her under her marriage settlement and of dower, he directed his debts to be paid; and bequeathed to one of his sisters an annuity of 900*l.*, and to the other an annuity of 500*l.* for their separate use, payable on the usual quarterly days of payment. Sir *K. Bruce*, V. C., in deciding that the annuities of 300*l.* were not satisfied by the annuities given by the will, but that the testator's sisters were entitled to both, thus expressed himself "the question appears to me to be a question of satisfaction; and although there are unfortunately, inconsistent authorities which seem applicable to this subject, it sufficiently appears that *prima facie* the testator must be taken to have intended bounty; and that gifts even more than equivalent in beneficial interest to satisfy the obligations, are not to be deemed satisfaction, if there are circumstances, even slight circumstances, which lead to a different conclusion. Now here the testator has directed the payment of all his debts, and amongst his debts are the annuities secured by the deeds. In his will intending the annuity given to his wife to be in lieu of other annual payments to which she might be entitled, he has expressly said so; but he has used no such expression with reference to either of the annuities secured to his sisters. Again, the annuities secured by the deeds, appear, by the Master's report, to be the first charges on the estates comprised in the

(v) 3 Beav. 324; see also *Wood v. Wood*, 7 Ib. 183, and *Hall v. Hill*, 1 Dr. & W. 94, stated 1 vol. 397.

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payment dif-
ferent.

deeds, but the annuities given by the will are subject to prior charges on the testator's estates; the times of payment are not the same, and the charges are of different natures; and under such circumstances, it appears to me, independently of any parol evidence, that the annuities given by the will cannot be taken as a satisfaction of the annuities secured by the deeds."

In *Smith v. Lyne* (*w*), *A.* transferred a sum of stock into the names of trustees, and by deed under his hand and seal declared certain trusts thereof for the benefit of *B.* and her children by him, *A.* He afterwards obtained from the trustees a retransfer of the stock to himself, and tore off the seals from the deed. By his will *A.*, not referring to the deeds, gave to *B.* an annuity and other benefits, and the residue of his estate to the children. On a bill filed after *A.*'s death by *B.*, Sir *K. Bruce*, V. C., holding that the testator had by means of the deed become indebted to *B.*, decided that she was entitled to both provisions.

Where the le-
gacy and debt
are of different
natures as to
the subjects
themselves.

3. We proceed with the third exception, where the legacy and the debt are of a *different nature*, either with reference to the subjects themselves, or with respect to the interest given.

A.—And, first, we adduce instances of the former. In the case of *Eastwood v. Vinke* (*x*), a husband upon his marriage, gave to a trustee for his wife, a bond in the penalty of 4,000*l.* conditioned that if at any time within four months he should settle freehold lands of the annual value of 100*l.* upon his wife for life, or if his heirs, executors or administrators should within four months after his death, pay unto his wife 2,000*l.* the bond was to be void. Soon after his marriage the husband made his will, and devised freehold and copyhold lands of the yearly value of 88*l.* to his wife and her heirs, and died within four months after the marriage, without having settled the 100*l.* a year upon his wife, who therefore claimed both the lands of 88*l. per annum* and the 2,000*l.*; and the Master of the Rolls observed, that, as money and lands were things of a *different nature*, the one should not be taken in satisfaction of the other; that the devise of such of the land as was *copyhold*, could not possibly go towards satisfaction of the 100*l. per annum*, which was to be *freehold*; nor, supposing the whole 88*l.* a year were freehold, would it go towards satisfaction of the 100*l.* a year, not being so expressed. But if there

(*w*) 2 Y. & Coll. (C.), 345.

(*x*) 2 P. Wms. 614; see 2 Eq. Ca. Ab. 355.

were not enough to answer the rest of the charges laid upon the land, or the bond creditors who might come upon the land, then indeed so much of the 88*l.* a year devised as was freehold might be taken towards satisfaction, because otherwise the testator's will would be disappointed; though, supposing there were assets to pay all the bond debts, and likewise the charges laid by the will upon the land (which was afterwards admitted), in such case the 88*l. per annum* should be enjoyed as a bounty and benevolence.

Where legacy by a debtor to his creditor not a satisfaction of the debt.

When legacy and debt of different nature.

Again, in the case of *Forsight v. Grant* (y), *William Grant* in the year 1761, entered into a bond to pay 2,000*l.* within three months after his death, to his intended wife for life, then for their children, but if none, for the wife absolutely. The marriage having taken place, *W. Grant* by his will gave all his real and personal estate which he then had, or might die possessed of, upon trust to pay the rents and interest of the whole to his wife for life: then to divide all, both real and personal, among his children equally, with benefit of survivorship, if any died without leaving issue; and if all died without leaving issue, to the plaintiffs, and he revoked all former settlements and wills. There having been no issue of the marriage, the devisees over commenced a suit against the trustees for an account, &c.; and the only question was, whether the widow was entitled to the benefit of the bond, and also the provision in the will? The counsel for the plaintiffs admitted, that unless some expression in the will could be pointed out to put the widow to her election, this could not be considered as a satisfaction, because, under the bond she was entitled to a principal sum within three months after her husband's death; under the will, only to the *rents and interest during life*, which were provisions of a different nature, but agreed that in that case such intention appeared on the will, but the Lord Chancellor, without hearing the other side, said, there was nothing in it, and held that the widow was entitled to both.

So also in the case of *Richardson v. Elphinstone* (z), *George Richardson*, by marriage articles in 1789, covenanted to pay to his wife, in case she survived him, 200*l.* free of all deductions, in the name of a jointure, and 50*l.* to provide herself with a house yearly, during life, to commence at *Whitsunday* or *Martlemas*, which should first happen after his decease. Afterwards, by his will, he directed his debts to be paid, and gave his wife for life, the capital messuage at *P. in Cornwall*, with the household goods,

(y) 1 Ves. jun. 298.

(z) 2 Ves. jun. 463.

Where legacy by a debtor to his creditor not a satisfaction of the debt.

When legacy and debt of different nature.

plate, linen, and china, therein; and devised an estate to his eldest son, when he should attain twenty-one: and he gave all the residue to trustees, upon trust, to invest the same in stock, and to permit his wife to receive 100*l.* *per annum* for life. He then gave annuities to his children, sister, and uncles, and declared, that the several annuities, as well to his wife, and children as to his sister and uncles, should be payable half-yearly, and commence from the day of his death. The testator died in 1791; the estate devised to his wife for life, was above the value of 100*l.* *per annum*. The question was, whether the provisions in the will for the wife were a performance of the covenant, or were intended as a satisfaction: and the Master of the Rolls said, "That if the testator had the articles in contemplation, it was absurd to suppose he should give a real estate in satisfaction for half, and an annuity, payable and commencing at different times, for the other half, provisions so extremely different, without expressing it to be a satisfaction; and that, therefore, it was no satisfaction of the covenant."

A legacy of a specific chattel will not *à fortiori* be a satisfaction of a debt, unless the legatee has accepted it as such (a).

Where the legacy and debts are of different natures as to the interest given.

B.—So also, in cases where the interest, which the creditor takes by the will, is not *ejusdem generis*, not being co-extensive with that, to which he is entitled from the testator as his debtor, the creditor legatee will be entitled to both interests. As if the testator be indebted to his legatee in a sum of money, to which, or to the benefit whereof, the legatee is entitled *absolutely*, and the testator bequeath to him an equal sum *for life only*, the latter provision will not be a satisfaction of the debt.

Thus in the case of *Alleyn v. Alleyn* (b), a son was entitled, under the marriage articles of his mother, to have 1,500*l.* laid out in the purchase of land for his sole benefit, after the deaths of his father and mother. The mother died; the father, by a second marriage had a daughter, and having made a provision for her by settlement, he by will, devised other parts of his estate to his daughter and her heirs, and the residue in trust for his son *for life*, and then to the daughter, with particular limitations and declarations of that trust. All his personal estate, except such as was given to the daughter, he gave to the same trustees, to pay all just debts and legacies; then to his son *for life*, with a bequest

(a) *Byde v. Byde*, 1 Cox, C. C. 49, *infra*.

(b) 2 Ves. sen. 37.

over to the daughter and her family. The question was, whether the testamentary provisions for the son, were in satisfaction of the 1,500*l.*; and the Lord Chancellor said, "There was no authority that such a bequest as that, of the residue of real and personal estate, after payment of just debts, to the testator's eldest son and heir for life only, should be construed a satisfaction for the 1,500*l.* the son was entitled to under his mother's marriage articles. If the son died in the life of the father, leaving several children, there was no provision for them; so if he survived, as he did, and had issue afterwards: and that the 1,500*l.* therefore must be considered a debt by specialty, affecting the testator's estate, to be retained by the son."

Where legacy by debtor to creditor is not a satisfaction of the debt.

Where legacy and debt of different nature.

We may here notice the case of *Bartlett v. Gillard* (c). There *Mary Gillard* bequeathed a leasehold estate to her son *Richard*, subject to the payment of an annuity of 12*l.* to the testatrix's daughter *A. M. Bartlett* during her life for her separate use, to be paid half-yearly. The testatrix died on the 27th *January*, 1793. *Richard Gillard* died many years after, having made his will which contained the following disposition: "I appoint *R. Gillard*, my whole and sole executor of my land and leasehold property here and at *Beeston*, or money that shall become due for the same, paying *Maria Bartlett* 12*l.* per annum by half-yearly payments, viz. the 27th of *January* and the 27th of *July*, and my sister *Elizabeth Gillard* 20*l.*" The question was, whether the bequest of the annuity of 12*l.* by the will of *Richard Gillard*, was a substitution or satisfaction for that bequeathed by the will of *Mary Gillard*, *Maria Bartlett* and her husband claiming both; insisting that the latter was cumulative and not substitutional. Lord *Eldon*, C. decided in favour of their claim, observing, "the second annuity is charged upon the freehold as well as the leasehold property; and, being payable to the wife generally, and not to her separate use, I think the case comes sufficiently within the authorities and doctrine applicable to this subject, to repel the presumption, that the second annuity was intended as a substitution and satisfaction for the first. The consequence is, that both annuities will be payable from the testator's death."

4. The case of *Mathews v. Mathews*, the facts of which are before stated (d), furnishes an illustration of a *fourth* exception; namely, that although the legacy and the debt be of the same nature, as well with respect to the subjects themselves, as to the

Where the legacy is expressed for a particular purpose.

(c) 3 Russ. 149.

(d) *Supra*, p. 1033.

Where legacy by debtor to creditor is not a satisfaction of the debt.

Where the debt is contracted subsequently to the will.

extent of interest therein, yet if the provision by the will is expressed to be given for a *particular purpose*, such purpose will prevent the testamentary gift being construed a satisfaction of the debt, because it is given *diverso intuitu*. In addition to the facts before given, the testator, in the year 1750, by deed, made his son tenant for life, instead of tenant in tail, as he was before, by levying a fine and resettling an estate in strictest settlement, and to no other uses: and one of the questions in the cause was, whether the claim of the son, under the deed of 1733, was satisfied by the annuity in the will of his father? Sir *Thomas Clarke*, M. R. observed, that, as to the annuity of 50*l.* for life to the son independent of the deed of 1750; what was given by the will was not a satisfaction of what was given by the deed of 1733. The testator had contracted a debt by the deed in 1733; and it was contended that the annuity given by the will was a satisfaction for that; but it was given by the will *diverso intuitu*. That it was the same, as if the testator had devised the settled estate to his son for life, &c., subject to an annuity to *A. B.*; and then, if the son had performed that condition, he could be entitled to claim under the deed of 1733. That the Court never carried the rule of satisfaction so far by construction, as to make that answer a double purpose. The testator had given the son 700*l.* annuity upon condition that he would settle the family estate; and then it was contended, to make that annuity pay a debt. On performing the condition, the son would be entitled to have recourse to the payment of the debt, under the deed of 1733; that that would be so, if the case rested on the will; but it was necessary to consider the deed in 1750, the effect of which was to render the annuity of 700*l.* a pure annuity, and free from the condition of the will, and as if no such condition had been inserted in it; and that if the annuity of 700*l.* had been given pure and free, it would be a satisfaction of the 50*l.* *per annum*. By the deed of 1750, therefore, it was within the general rule of satisfaction, *though by the will* it would not have been so.

The case of *Drewe v. Bidgood* (e) may be classed under the present division, where the subsequent will makes no reference to the existing debt, but assigns a different motive, that of natural love and affection.

There *A.*, as his father's executor, being indebted to the trustees of his sister's marriage settlement, by deed settled upon her and her children a sum of a larger amount, *in consideration of*

(e) 2 Sim. & Stu. 424.

the natural love and affection he bore them. Sir John Leach, V. C. held that it was not a satisfaction of the debt.

Where legacy by debtor to creditor is not a satisfaction of the debt.

5. The next exception is, where the debt of the testator is contracted *subsequently* to the making of the will; for, in that case, the legacy will not be construed a satisfaction. The testator, in the case of the subsequent debt, could not have had any intention to satisfy by his will a duty which was not then in existence. So that the date of the will is a material fact.

Where the debt is contracted subsequently to the will.

In *Cranmer's* case (*f*), Mrs. *Fisher* bequeathed *Cranmer* a legacy of 500*l.*, and made him executor. After making of the will, she borrowed 150*l.* of him, and died. The Master of the Rolls decreed the legacy a satisfaction of the debt. But Lord *Harcourt*, C., reversed the decree: and said, as to the debt contracted *after* the will, there was no pretence to make the legacy a payment of that.

Again in *Thomas v. Bennet* (*g*), a legacy of 100*l.* was given to the executor; and the testator, having afterwards contracted a debt of 25*l.* with him, it was resolved by Lord Chancellor *King*, that the debt, being contracted *subsequently* to the will, the legacy could be no satisfaction for the same.

By the 1 Vict. c. 26, sect. 24, it is enacted, that every will (made upon or after the 1st of *January* 1838) shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect, as if it had been executed immediately before the death of the testator, *unless a contrary intention shall appear by the will*.

The ground upon which the cases in this section were decided, was the necessary absence of intention in the testator by the legacy to satisfy a debt which, at the date of the gift had not any existence: on the score of intention that argument it is conceived is equally applicable to cases since the statute, and would bring them within the exception of the concluding words of the enactment.

6. We have seen from the cases, in the second subdivision of the present section, that a difference in the times of payment of the debt and legacy prevents the latter from being a satisfaction. Where the legacy is contingent (*h*), or uncertain, there arises a still stronger inference of intention against the rule of pre-

Where the legacy is contingent or uncertain.

(*f*) 2 Salk. 508.

(*h*) See *Nicholls v. Judson*, *supra*,

(*g*) 2 P. Wms. 343; also *Fowler* p. 1032.

v. Fowler, *supra*, p. 1028.

Where legacy
by debtor to
creditor is not
a satisfaction of
the debt.

When legacy
contingent or
uncertain.

suming satisfaction; and in such a case a further exception has accordingly been established. It is immaterial, whether the contingency arise from some condition annexed to the gift by the express terms of the will, or from the fluctuating nature of the subject of the gift itself. Of the former class of contingent legacies the case of *Crompton v. Sale* (i) is an instance.

In that case, *Thomas Boddington* bequeathed to his sister *M. Potter*, an annuity of 10*l.* for life, payable quarterly, clear of all taxes: to his niece *E. Potter*, daughter of *M. Potter*, an annuity of 5*l.*, and to his niece *M. Nicholls* an annuity of 10*l.*, and to his daughter an annuity of 5*l.*, to be paid quarterly during their respective lives. He also gave to his niece *M. Dimmock* an annuity of 10*l.*, and to her daughter *E. Dimmock* an annuity of 5*l.*, to be paid quarterly during their respective lives, and he directed that the above-mentioned annuities should be paid by his wife out of his personal estate, tax free; and appointed her sole executrix, and residuary legatee. The testator's widow gave by her will to *E. Potter*, daughter of the said *M. Potter*, an annuity of 5*l.*, to be paid quarterly, to hold to her and her heirs for ever, in case she *should survive her mother, and not otherwise*; she also gave to the said *E. Nicholls*, daughter of her niece *M. Nicholls*, an annuity of 5*l.* to be paid quarterly, free from taxes, to hold to her and her heirs for ever, in case the said *E. Nicholls* should survive the testatrix's sister *M. Potter*; to her niece the said *M. Dimmock*, an annuity of 10*l.* to hold to her and her heirs for ever; and to her daughter the said *E. Dimmock*, an annuity of 5*l.* to hold to her and her heirs for ever; all the said annuities to be paid quarterly, at Lady-day, Midsummer, Michaelmas and Christmas; and the payments to begin on such of the quarterly days as should first happen next after her death. The testatrix next directed that the several annuities should be paid out of her personal estate, until a purchase of lands could be effected, which she ordered to be made, of sufficient value to secure the annuities. The question was, whether the annuities bequeathed by the widow to *E. Potter*, *E. Nicholls*, *M. Dimmock* and *E. Dimmock*, should be taken as a satisfaction of the like annuities given to them by the will of *Thomas Boddington*? the widow being a debtor in respect thereof, as executrix and residuary legatee of her husband's will; or whether they should have the several annuities given by both wills? Lord King, C., remarked upon the annuities given by

(i) 2 P. Wms. 552.

the widow to *E. Potter* and *E. Nicholls*, that, being upon the contingencies of their surviving their respective mothers, there could be no pretence to say they should be a satisfaction of the annuities given them absolutely by *Thomas Boddington's* will: with respect to the annuities given to *M. Dimmock* and *E. Dimmock* by the widow's will, although of the same yearly value, and of longer duration than those bequeathed by the testator's will, yet, as the widow had not declared that the one should be a satisfaction of the other, he (Lord *King*) saw no reason, why she should not be supposed to have intended to be kind as well as just to her husband's relations. His Lordship decreed that *M. Dimmock* and *E. Dimmock* should have the several annuities given them by both wills; and that *E. Potter* and *E. Nicholls*, besides what was given to them by the will of the testator, *Thomas Boddington*, should also have the annuities given them by the widow's will, if they survived their respective mothers.

Where legacy by debtor to creditor is not a satisfaction of the debt.

When legacy contingent or uncertain.

The last case with respect to the annuities given by the widow to *M. Dimmock* and *E. Dimmock* is a strong authority to show the disposition of the Court to avoid the rule in favour of satisfaction; and it might be contended, that it is difficult to distinguish the case as to those two annuities, from the cases adduced in the first section of this chapter in support of the rule; and that Lord *King's* determination seems to exclude the rule altogether, and to infer that in no case shall the legacy be deemed a satisfaction of the debt, unless an intention is clearly expressed or implied it should have that effect. It may, however, be remarked, in support of Lord *King's* determination, that these two annuities to *M. Dimmock* and *E. Dimmock* were coupled with others, which the Court according to well established rules, was bound to consider as not importing any intention in favour of satisfaction; and that as no contrary intention appeared in regard to the annuities to *M. Dimmock* and *E. Dimmock*, he was bound to consider them in the same light with the rest.

In *Pullen v. Cresy* (j), a testator gave to each of the children of *A.* 50*l.* to be paid to the father for their use; the father by will gave to each of his children 260*l.* if they attained the age of twenty-one years; it was decided that the legacies by the father's will, were no satisfaction of the legacies given to his children by the will of *A.*

We proceed with the second class of contingent legacies; as where the debtor has bequeathed to his creditor the whole or half

Where the legacy is contingent from the

(j) 3 Anst. 830.

Where legacy by debtor to creditor is not a satisfaction of the debt.

uncertain nature of the subject; as of a residue.

of his residuary estate, such bequests simply, though eventually of larger amount than the debt, have never been adjudged a satisfaction; for *non constat* at the date of the will, whether, at the testator's death, after all claims upon his property are satisfied, his estate, which was in continual fluctuation till the last mentioned period, will be equally beneficial to the legatee as his debt. It is therefore inferred from the nature of a residue, and the uncertainty of its amount, that when a testator bequeaths it wholly or in part to his creditor, he does not intend such an indefinite bequest to operate as a satisfaction of a certain and definite duty.

Accordingly in the case of *Devese v. Pontet* (*k*), *Felix Devese*, in 1768, covenanted by marriage articles, that in case *Barbara Gillanders*, his then intended wife, should survive him, and there should be no issue, his heirs, executors or administrators, should within nine months after his death, pay her 800*l.* for her own use, benefit and disposal; but if there should be any child or children of the marriage, then that the interest thereof should be paid to his wife for life, and after her death, the principal paid to or divided among such child or children, &c. In 1781, *Felix Devese*, after giving by his will several specific articles to his wife, directed that all the debts owing to the business which he then carried on, should be collected with all possible dispatch; that the household goods and stock in trade should be valued, and the money which should be in the public funds, and the produce of all being collected, the whole should be divided into two equal shares; the one to be the property of his dearly beloved wife, for her to dispose of as she pleased; the other to be the property of his brother *Peter Devese*, whom he appointed his heir general. One question was, whether the provision in the will for the testator's widow, was a satisfaction of the covenant in the marriage articles? Upon which the Master of the Rolls observed, that the rule should be adhered to, as laid down by Lord *Somers*, in *Goodfellow v. Burchett* (*l*); who observed, that cases of this nature depended upon circumstances, and when a legacy had been decreed a satisfaction, it must be grounded upon some *express evidence*, or at least a *strong presumption*, that the testator intended it as such. That he (the Master of the Rolls) could not find any in the present case. If that opinion interfered with the disposition of the will, he should yield, but

(*k*) 1 Cox, Ca. 188; Prec. Ch. ed. by Finch. 240, in *notis*; see also *Barrett v. Beckford*, 1 Ves. 519. (*l*) 2 Vern. 297.

he thought that it did not, for he could not say, that the testator had it in contemplation to satisfy the covenant. There were two provisions made by the articles, one in case of no issue, the other in case of issue. Had the testator intended to satisfy the covenant, it was reasonable to presume, he would have done so *in toto*: yet had the wife been *enceinte*, the will would not have provided for the second part of the covenant. If, therefore, the slightest circumstances were to be laid hold of, he might take in aid these circumstances to make it doubtful, whether the testator meant to satisfy the covenant; and in that case, he might say with Lord *Thurlow* in *Haynes v. Mico* (m), “*incumbit onus petitori*”: viz., the person saying it was a satisfaction. Another ground was, that an unliquidated residue had never been taken as a satisfaction. Where a positive sum was given, it might be conceived that the testator so intended; but where it was to wait the result perhaps of a long protracted suit in Chancery, it never could be meant so. It must be argued that the party was to wait the event for years, and then if the sum was equal to the debt, it must be taken in satisfaction. But that was denied in *Barrett v. Beckford*, and how did the present case differ? Upon the general principle, therefore, laid down by Lord *Somers* and Lord *Hardwicke*, that a residue should not be taken in satisfaction, he (the Master of the Rolls) was of opinion that the covenant in the marriage articles was not satisfied by the provision of the will.

Legacy by debtor to creditor is not a satisfaction of the debt.

Where debt is contingent.

7. The same principle which induced the Court of Chancery to establish an exception to the rule of satisfaction, where the *bequest* is uncertain or contingent, led to a similar construction, where the *debt* itself is contingent, as where it arises from a running account between the testator and the legatee; for, in such case, if, upon the winding up of an account current, the testator's estate should appear indebted to the legatee, the legacy shall not be considered a satisfaction of such casual debt; for *non constat* it might be known to the testator that any thing was owing from him to the legatee; so that no intention can be inferred, that the testator meant the legacy a satisfaction of the debt, which at the date of his will he did not know to be existing.

Where the debt is contingent.

Thus, in *Rawlins v. Powel* (n), the testator owed the defendant,

(m) 1 Bro. C. C. 129, *supra*, p. 1036; and see *Adams v. Lavender*, *supra*, p. 1037.
(n) 1 P. Wms. 296.

Where legacy
by debtor to
creditor is not
a satisfaction of
the debt.

When debt is
contingent.

upon an open running account, monies computed to be upwards of 300*l.*; and by his will gave the defendant a legacy of 500*l.*, and appointed him executor, without disposing of the residue. The next of kin of the testator filed their bill against the defendant, insisting that the legacy should be a satisfaction of his debt. The Master of the Rolls decreed in favour of the defendant; and upon an appeal to Lord *Cowper*, his Lordship said, the nature and circumstance of the debt were material; for it was upon an open running account between the testator and his executor, so that it might not be known to the testator whether he owed any money to the executor or not; then the testator could not intend the legacy to be in satisfaction of the debt, which he did not know that he owed, any more than a legacy could be a satisfaction of a debt contracted after the making of the will (*o*). The decree, upon a subsequent day, was, that the defendant should have both the debt and the legacy.

On debts due
on bills of
exchange.

In *Carr v. Eastabrooke* (*p*), the Master of the Rolls was of opinion, that a debt due upon a *negotiable bill of exchange* was not such a debt as would be cancelled by a subsequent legacy; and it seems upon this principle, that, as the debt might be transferred *instantly* to a stranger upon receipt of the bill by the payee, if it were, nothing would be owing from the testator to the legatee, of which the legacy could go in satisfaction. As no presumption, therefore, is to be made in favour of the rule of satisfaction, the Court will not imply or infer an intention in the testator to cancel such contingent debt by a testamentary gift.

Of servants'
wages.

There appears to be some doubt, whether servants' wages form a further exception to the rule of presuming satisfaction of a debt by a legacy; and the consideration of this question might in point of arrangement be introduced in this place, since it is conceived that the fluctuating and uncertain nature of wages is one of the reasons for their forming an exception; but it was thought more convenient to discuss this subject in a subsequent section of the present chapter.

Indeed, the Court, as before observed, lays hold of any circumstance, however trifling, to raise a presumption, that the testator did not intend the legacy as a satisfaction. Of this, the case of *Meredith v. Wynn* (*q*) is an illustration. By the wills of Serjeant *Owen Wynn* and another person, a legacy of 100*l.* and

(*o*) See *Cranmer's* case, 2 Salk. ch. 14, s. 2, pp. 864, 889.
508, *supra*, p. 1045.

(*q*) Prec. Ch. 314.

(*p*) 3 Ves. jun. 561, and see Vol. I.

another of 50*l.* were left to *Barbara*, the daughter of *John Wynn*; which sums of money were owing from *John Wynn*, as executor of both testators. *J. Wynn*, having authority under his marriage settlement to charge real property with a sum of 2,000*l.*, executed his power in favour of his daughter *Barbara*, and another daughter *Dorothy*, directing that his son *William* should, within two months after his death, give them security for 1,000*l.* a piece; and he also gave his two daughters additional legacies of 250*l.* each. The question was, whether the provisions made by the father's will in favour of *Barbara*, should go in satisfaction of the two legacies of 100*l.* and 50*l.* owing to her from him at the date of the will: and it was determined, that the benefits given to *Barbara* by her father's will were not to be considered in satisfaction of the two legacies, because there was no legacy given to *Barbara* in particular; the 2,000*l.* which the father had the power of charging being given *equally* to his two daughters: if, therefore, such gift should be taken as a satisfaction of *Barbara's* two legacies, she would not receive an equal share of the 2,000*l.*, since she would be deprived of the two legacies given her by the wills of the other persons; and the father's bequest of the 2,000*l.* to his two daughters *equally*, shewed that he intended to make no difference between them, as to the shares which they were to receive.

Where legacy by debtor to creditor is not a satisfaction of the debt.

Where will directs payment of debts and legacies.

8. It seems, that where there is an express direction in the will for payment of *debts and legacies*, the Court will infer from the circumstance, that the testator intended that both the debt owing from him to the legatee, and the legacy, should be paid. Lord *King* appears to have relied considerably upon such direction, in reversing the decree of the Master of the Rolls, in *Chancey's* case (*r*). In that case, one being indebted for wages to a maid servant, who had lived with him for a considerable time, gave her a bond for 100*l.*, and in the condition of the bond it appeared to be for wages; afterwards the testator, by his will, among other things, gave a legacy of 500*l.* to his maid servant, and it was mentioned in the will to be given to her, *for her long and faithful services*. The maid servant having, on her master's death, possessed herself of divers goods that were his, the plaintiff *Chancey*, who was the executor, brought his bill against her for an account, but paid to her 100*l.* and interest secured to her by the bond. For the defendant it was urged, that she should

Where the will contains an express direction for the payment of debts and legacies.

(*r*) 1 P. Wms. 408.

Where legacy
by debtor to
creditor is not
a satisfaction of
the debt.

Where will
directs payment
of debts and
legacies.

have both the money due on the bond, and also the legacy; for the legacy was a further reward for her services, and intended to be a gift *in toto*. The Master of the Rolls decreed the legacy a satisfaction. But his decree was afterwards (s) reversed by the Lord Chancellor *King*; upon which occasion his Lordship said, that this case was attended with particular circumstances, varying it from the common case, *viz.* that the testator, by the express words of his will, had devised "*that all his debts and legacies should be paid*;" and this 100*l.* bond being then a debt, and the 500*l.* being a legacy, it was as strong as if he had directed that both the bond and legacy should be paid; that when the testator gave a bond for the 100*l.* arrear of wages, it was the same thing as paying it; and as, if he had actually paid it, and had afterwards given the legacy of 500*l.* the executor could not have fetched back the 100*l.* and made the defendant refund, so neither should the bond in this case be satisfied by the bequest of the legacy.

So also, in *Richardson v. Greese* (t), Mrs. *Westbrooke* being indebted to *Jane Greese* in the sum of 260*l.* upon a bond, made her will, whereby she gave her 500*l.* The testatrix gave 5*l.* a piece to the rest of her servants, but added, "I do not give 5*l.* to *Jane Greese*, because I have done very well for her before;" and in the subsequent part of her will, the testatrix devised her real estate upon trust to pay her debts, and "*after debts and legacies paid*," then bequeathed the surplus over. After the testatrix's death, and payment of the legacy, the bill was brought to stay execution upon the bond, upon the ground that the legacy was a satisfaction of the debt. But Lord *Hardwicke*, C., decreed that the words, "*after debts and legacies paid*," were much stronger than in *Chancey's* case; and that the words of the will intimated that the testator meant the 500*l.* to be equally a reward for *Jane Greese's* services, as the 5*l.* was for the other servants; and legacies to servants had never been held to be in satisfaction of debts; and his Lordship decreed, that there was enough in that case to take it out of the common rule, and that the legacy was not to go in satisfaction of the debt.

Again in *Field v. Mostin* (u), the testatrix, being indebted to Mrs. *Hutchinson* in the sum of 141*l.* bequeathed to her 500*l.*,

(s) Trinity T. 1725.

(t) 3 Atk. 64.

(u) Dick. Rep. 543, and see 3

Anst. 831, note, and *Hales v. Darell*,
3 Beav. 324.

and gave the residue of the personal estate *to pay her debts and legacies*, charging her real estate in aid of the personal. The question was, whether the legacy of 500*l.* was a satisfaction of the debt, and it was said by the Lord Chancellor, that it was evident from the will that the testatrix intended both debts and legacies to be paid. He therefore declared, that the legacy was not to be considered a satisfaction of the debt.

Where the creditor-legatee is a servant of the testator.

SECT. III. Inquiry how far the doctrine of satisfaction is affected by the relation subsisting between the testator and the creditor-legatee.

We proceed to inquire how far the doctrine of satisfaction is influenced by the relation subsisting between the testator and his creditor-legatee; and,

Where the creditor-legatee is a servant of the testator.

First, where the relation is that of master and servant.

In *Richardson v. Greese* (v), the reader will have noticed Lord *Hardwicke's* observation that legacies given to servants had never been adjudged to go in satisfaction of debts due to them. But it is to be observed from *Chancey's* case (w), and the case cited by the Master of the Rolls, before stated, in his judgment in *Mathews v. Mathews* (x), that, if servants' wages had been a general exception to the rule, there would not in those cases, have been any occasion for the Court to resort to the peculiar wording of the wills. In the case of *Wallace v. Pomfret* (y), Lord *Eldon* alluded to the *dictum* of Lord *Hardwicke*, but did not expressly declare his acquiescence in, or dissent from, the opinion therein expressed. The case before Lord *Eldon* was decided on the parol evidence, in opposition to the *presumption* raised by the *will itself*, that the legacy was intended as a satisfaction; and we shall here introduce the case for the sake of his Lordship's observations respecting the admission of parol evidence in such cases. *R. T. Moreton* gave a legacy of 500*l.* to *Wade*, over and above what the testator might owe him; to his servant *James Staines*, if in service at his decease, 10*l.* over and above what he (the testator) should owe him for wages or otherwise; adding, "and I give to my housekeeper, *Mary Pomfret*, 1,000*l.*" He then gave *Mary Pomfret's* mother an annuity of 10*l.* for life, and legacies to her sister and father; and gave all the residue to her executors, "after payment

Parol evidence.

(v) 3 Atk. 64, *supra*.

(w) 1 P. Wms. 408, last page.

(x) 2 Ves. sen. 636, *supra*, p. 1033.

(y) 11 Ves. 542.

Where the creditor-legatee is a servant of the testator.

of his debts, funeral charges and the probate of his will, and the aforesaid legacies." The bill was filed by the executors against *Mary Pomfret*, praying that the legacy might be declared a satisfaction of 125*l.* 12*s.* 6*d.*, claimed by the defendant for four year's wages. In favour of the defendant, evidence was adduced to prove that the arrears were incurred at the request of the testator, he promising to invest it for *Mary Pomfret*, and that the testator, among other expressions in her favour, had observed as a reason for leaving *Mary Pomfret* more than her parents and sister, "that had it not been for her he would have been dead long ago." For the plaintiff, *Chancey's* case and *Richardson v. Greese* were cited, and it was insisted that the inference in favour of satisfaction arose from the intention expressed in the will as to the other legatees. The Lord Chancellor, upon the hearing, said, "It would be too hasty to decide this case without seeing the will. If no new topic of argument arises upon the will, the case will turn altogether upon the question as to admitting the evidence, and the effect of it; for whatever is due to the remark of Lord *Hardwicke*, that there is no decision, applying this rule to a servant's wages, this case is not to be decided upon the general rule of presumption." After remarking upon the legacy to *James Staines*, his Lordship continued; "As to two persons, standing in the same relation to him, and having demands of the same nature, he (the testator) says, the legacy to one is to be in addition to wages, and does not say that as to the other. The presumption, therefore, not upon the rule of law, but upon the whole will, is that this legacy is not in addition to wages; the testator having expressly directed, that the other shall be in addition. The question, whether the evidence is admissible or not, turns upon the point, whether the inference from the express direction, that the other legacy shall be in addition to wages, is strong enough to require a decision, that as to this legacy the addition to wages is upon the face of the will necessarily excluded. If it is not, then, upon the rule as to satisfaction of portions (z), &c. these declarations may be admitted. If admitted they are to be looked at with great attention, to see whether the necessary effect is to beat down the fair inference from the written context, which is the most solemn declaration

(z) *Hinchcliffe v. Hinchcliffe*; noticed, *supra*, ch. 6, s. 2, p. 402; *Sparkes v. Cator*, 3 Ves. 516, 530; *Pole v. Lord Somers*, *Druce v. Denison*, 6 Ves. 309, 385. *Trimmer v. Bayne*, 7 Ves. 508; *Robinson v. Whitley*, 9 Ves. 577,

he can make; particularly as the parol declaration is not contemporary. The truth of the declaration may, in a great degree, be tried by the will itself. As to the effect of the declaration upon the written will, that is always a difficult question; seeing these declarations construed so very differently, which I am authorized to say by these two cases, that have been cited." Upon a subsequent day, his Lordship (after citing the cases, and to which the reader is referred) observed, "All the cases authorize the admission of evidence, which is clearly to be admitted in this instance, and I am very sorry to add, that I think myself fully justified by all the cases in saying, that evidence has not only been admitted, but at least as much effect has been given to it, as can be said fairly to belong to it. But looking at the parol evidence in this case, it is infinitely stronger than in any of the cases in which evidence has had effect; provided it is believed, and there is great hazard I admit, of deciding upon what is not true; but I have no right to reject this evidence as false. The first part of this declaration brings this very much to the case I have cited from Mr. *Browne's* (a) manuscripts, that the legacy was for her attention to him in sickness, and the wages for service. The subsequent part of the evidence is an express declaration, as to what he owed her for wages, that he intended to put her money out at interest; his Lordship, therefore, declared that the legacy was not a satisfaction of the debt; and the bill was dismissed accordingly.

Where the creditor-legatee is a servant of the testator.

In the last case, the reader will perceive, that Lord *Eldon* avoided giving an opinion upon the general question, whether wages formed an exception to the general rule of presuming satisfaction, but decided the case before him upon the parol evidence, which he considered admissible to rebut the presumption of satisfaction, raised, *not by the rule of law*, but by the *will itself*. Had the will *not* raised the presumption, Lord *Eldon*, in admitting the parol evidence, would have virtually overruled Lord *Hardwicke's dictum*; since, if wages were not within the rule, then obviously there was no necessity for resorting to evidence to rebut a presumption, which in that case the law did not raise (b). The case of *Wallace v. Pomfret* seems, therefore,

(a) The King's Counsel in the time of Lord *Hardwicke*.

(b) Sir *Edward Sugden* in the case of *Hall v. Hill*, 1 Dr. & W. 123, reluctantly expressed his opinion that upon the best consideration he

had been able to bestow on the case of *Wallace v. Pomfret*, he said it with the greatest diffidence, he did not see how it was possible to maintain the decision consistently with the other authorities.

Where the creditor-legatee is a child of the testator.

to leave Lord *Hardwicke's dictum* untouched. It is presumed, the question can only arise on wages due at the time of making the will; and with respect to such, it is difficult to discover any reason distinguishing them from other debts, except that which arises from the relationship of master and servant; namely, that a legacy to a *servant* strongly implies in its very nature the peculiar motive or purpose of remunerating fidelity and attention, beyond the stipend for ordinary service, which the testator must know would be paid at all events out of his personal estate as a debt. Such peculiar motive has been considered of importance in *Chancey's* case, and that cited by the Master of the Rolls in *Mathews v. Mathews*, and also in the cases of double legacies before discussed; and might have been thought sufficient to support Lord *Hardwicke's dictum* in the absence of authority to the contrary. But that *dictum* may, upon the authorities before noticed, be considered at least doubtful. With respect to wages accrued since the making of the will, the preceding reason is equally applicable; but their being contracted after the making of the will brings them within *Cranmer's* case, and *Thomas v. Bennet* before noticed (c). A further reason may be adduced, similar to that which governed the cases of *Rawlins v. Powel*, and *Carr v. Eastabrooke*, also before noticed (d); viz. that as the debt is uncertain and fluctuating, growing due from time to time, it cannot be inferred that the testator intended the legacy to be a satisfaction of a claim, which might not exist at his death, or, if it did, the amount of which he could not possibly know.

Where the creditor-legatee is a child of the testator.

In the *second* place we shall consider how far the doctrine of satisfaction is affected by the relation of parent and child; whether a debt due by a parent to a child, but not as a portion, is considered in the same light as a debt to a stranger; consequently, whether, in the absence of an expressed or implied intention, the legacy would be presumed a satisfaction of the debt. We have the authority of Lord *Alvanley*, when Master of the Rolls, in *Tolson v. Collins* (e), that it shall be so considered. In that case, *Mary Powel* bequeathed to *John Collins* her executor, the sum of 800*l.*, upon trust for his four children, equally, with benefit of survivorship, in case of death, &c. and she appointed *John Collins* and *Samuel Alford* executors. After the testatrix's

(c) *Supra*, p. 1045.

(d) *Supra*, p. 1050.

(e) 4 *Ves.* 483; see also *Pullen v.*

Cresy, 3 *Anst.* 880; *Acheson v. Fair*, 2 *Con. & L.* 208, 219, 220.

death, *John Collins* received the 800*l.*, and afterwards died leaving his four children named in *M. Powell's* will, and another son surviving. The testator, by his will gave, among other sums, the legacy of 500*l.* to *Jane*, one of his daughters, if she attained twenty-one, and not otherwise, with interest in the meantime; he also gave similar legacies to his other children. Upon a bill filed by *Jane Collins* and her husband for 200*l.*, her share of the legacy given by the will of *Mary Powell*, the question was, whether the plaintiffs must not elect to take the legacy of 200*l.* under *Mary Powell's* will, or the provision under the will of *John Collins*. The Master of the Rolls said, "Whatever may be the conjecture as to what this testator did intend, the single question is, whether by any rule that has prevailed with regard to a debt due from a parent to a child, and a bequest to that child by his will, this can be considered as a satisfaction of the debt admitted to be due by the testator to these four children. It is said, that, when this testator made his will, he gave these children a greater benefit than they would have derived under the debt. But it is admitted, that it is not such a benefit, as, in the case of any one but a parent, would have been a satisfaction. I am very far from differing from *Hinchcliffe v. Hinchcliffe* (*f*). On the contrary, I think it is confirmed by all the cases that have been cited. But I decide upon this; that this is not the case of a *portion*; and I lay down generally, that a legacy by a father to a child, is not a satisfaction of a debt due to the child, in any other way than a debt due from a stranger would be satisfied by such a legacy. I must try it by the same rule; and see, whether it appears by the will, that he considered it as part of his personal estate; and it is admitted, that if this was the case of a stranger, this legacy would not be a satisfaction. Therefore I must hold that this legacy is due to the plaintiff."

Where the creditor legatee is a child of the testator.

The rule laid down in the last case was adopted in the absence of sufficient intimation of the testator's intention. The case of *Plume v. Plume* (*g*), next stated, and which at first sight might appear at variance with *Tolson v. Collins*, was decided upon its peculiar circumstances; from which, coupled with the expressions of the will, Lord *Eldon* considered that the testator intended his son's claim (if any) should be satisfied by the bequests in his favour. In the case last alluded to, the testator, residing and carrying on business at *Hoddesdon* in *Hertfordshire*, placed his son *Jeremiah*, who had been employed for some time with a

(*f*) 3 Ves. 516, *infra*.

(*g*) 7 Ves. 258.

Where the creditor legatee is a child of the testator.

tradesman at *Southwark* at a guinea a week, at *Enfield*, in the business of a *cooper*. The son, while he conducted this business, rendered accounts to his father from time to time, receiving no wages, and merely deducted the money expended for his board. Afterwards the father, by his will, gave all his estate and effects to his executors, directing them to carry on the trade for two or three years; and to make an inventory of his effects, and a separate inventory of his property at *Enfield*, and from the amount of the appraisement of those effects, to deduct 60*l*. which he gave to his son *Jeremiah*, to whom he also gave 10*l*. on condition of instructing his brother in the trade; and the residue he directed to be paid by instalments of one, two and three years; and all the residue he directed to be divided among his other children by name, omitting *Jeremiah*. *Jeremiah* having set up a claim of 48*l*. after his father's death, but never during his life, for wages due to him for his trouble in carrying on the trade for one hundred and twenty-nine weeks, the question submitted to the Court for decision was, whether the benefit to which *Jeremiah* was entitled under his father's will, was not a satisfaction of the debt *Jeremiah* claimed against his estate? Lord *Eldon*, C., said the case must be decided for the plaintiffs, the other children of the testator; that he doubted extremely whether the defendant *Jeremiah* was a creditor: and after reviewing the circumstances of the case with respect to the transactions between the father and the son, shewing an intention on the part of the father, and an acquiescence on the part of the son, to the arrangement as a future provision and establishment for the son, and connecting these facts with the dispositions and expressions of the will, his Lordship concluded, "the intention was to satisfy every demand his son had upon him, and he never conceived that his son stood in a relation to him as a creditor, or could make any demand. This case is very different from that of a perfect stranger upon a question of implied *assumpsit*; in such a case, regard being had to the relation, though a son *foris familiated*, and to the expectation of being remunerated, which that relation gives; attending also to the circumstance, that the son lived in that employment one hundred and twenty-nine weeks, and never made any demand whatsoever." The Court was therefore of opinion, that the son's claim to such a debt, and the provisions in his father's will could not be maintained (*h*).

(*h*) See also *Stocken v. Stocken*, 4 Sim. 152; *Earl of Glengal v. Barnard*, 1 Keen, 771.

We proceed to notice in this place a class of cases, which, though not strictly within the subject of the present Treatise, nevertheless are so closely connected with the cases lately discussed, that they may with propriety be introduced. The rule laid down in *Tolson v. Collins* (i) is, that where a debt *not in the way of portion* is due from a parent to a child, a *legacy* by the parent shall not, in the absence of evidence of intention expressed or implied, be presumed a satisfaction of the debt due to the child, any more than to a stranger. But the cases to be next mentioned establish the following proposition; that where such a debt exists, an advancement, upon the child's marriage, or upon some other occasion, of a portion equal to or exceeding the debt, in the parent's life, shall, *prima facie*, be deemed a satisfaction of the debt previously owing. The first case is *Wood v. Briant* (j). The plaintiff's wife was entitled to the residue of her grandmother's estate, under her will, and was also appointed executrix. Her father was administrator *durante minore ætate* of his daughter. At the period of her marriage with the plaintiff, he was by agreement to have 800*l.* from the father, which in the settlement was mentioned to be a portion, and in consideration of natural love and affection. It was insisted for the plaintiff, that he was entitled to an account of the residue of the grandmother's estate, from the representative of the wife's father, and that the 800*l.* paid by her father upon her marriage, was not in satisfaction of this residue, especially as it was expressed to be given for natural love and affection; and it was also contended, that as the father at the time of the marriage, was worth 8,000*l.* at the least, and had only this daughter and one son, it was not probable he meant it as a satisfaction. That there was no case to be produced, where a father was indebted to a child on account of a demand under the will of a collateral relation, that before the demand was liquidated, his giving a sum as a portion to this child had been held to be a satisfaction of the demand. The defendant's counsel rested chiefly upon the parol declarations of the plaintiff and his wife, soon after the marriage, that the 800*l.* was intended both as a portion and a satisfaction for the residue of the grandmother's estate; and the depositions of six or seven witnesses were read, which were very full to this point. To encounter this evidence, proof of the father's declarations before and after the marriage was read for the plaintiff, *viz.*, his saying that his mother had left 500*l.* at least to his daughter, and that

Where an advancement in parent's lifetime is a satisfaction of a debt due from the parent to the child.

(i) *Supra*, 1056.

(j) 2 Atk. 521.

Satisfaction of debt due to a child, by advancement of a portion in parent's lifetime.

he would give the plaintiff 1,000*l.* and make a man of him; and not above six weeks before his death, his declaration to the plaintiff, "thou knowest I owe thee a great deal of money, and thou shalt not be wronged of a farthing." Lord *Hardwicke* said the plaintiff was entitled of course to what remained due upon the 800*l.* The first question was, whether there were a presumptive satisfaction of the legacy to the plaintiff's wife, under the grandmother's will, by the 800*l.* being advanced to her by the father on her marriage? he did not think any certain rule could be laid down, but the cases must depend upon their particular circumstances. *There were very few cases, where a father would not be presumed to have paid the debt he owed to a daughter, when in his lifetime he gives her in marriage a greater sum than he owed her*, for it was very unnatural to suppose, that he would choose to leave himself a debtor to her, and subject to an account. As to the case of *Chidley v. Lee* (*k*), the ground Sir *John Trevor* went upon was, that the husband knew nothing of the legacy to the wife from the collateral ancestor, and therefore held it was not satisfied by the portion, though it was a much larger sum than the legacy; but he (Lord *Hardwicke*) said he thought that was an extreme hard case, and he should have been inclined to determine it otherwise. If the present case rested upon the presumption only, he should be of opinion that the 800*l.* was a satisfaction for the residue under the grandmother's will. The evidence on the defendant's side, with regard to the declarations of the plaintiff and his wife, were very strong, and applied directly to the point of satisfaction; and on the other side, there were only loose and general declarations of the father, that he was indebted to the plaintiff. His Lordship therefore decreed, an account of the father's personal estate as to the 800*l.* only.

Again, in *Seed v. Bradford* (*l*), a bill was filed by the plaintiff, administrator to his wife, one of the daughters of *William Bradford*, which daughter was entitled to a fifth part of a legacy of 520*l.* left to her and four sisters by the will of *Thomas Tindal*, their grandfather, who had made the wife of *William Bradford* executrix. *William Bradford*, as her husband, possessed himself of the personal estate of *Thomas Tindal*, mixed the assets with his own property, applied them in his own business, and continued so until his death. In 1740 there was a treaty for the marriage of the plaintiff with one of *William Bradford's* daughters, upon which *William Bradford* was to give 400*l.* as a marriage

(*k*) Pre. Ch. 228.

(*l*) 1 Ves. 500, *Bell's* ed.

portion, as sworn by the plaintiff's father, one of the parties to the agreement. Upon the wedding day, *William Bradford* went up and fetched 400*l.* which was put by for the husband's use, one witness swearing that *William Bradford* said, "there is the money, but that is not all;" another, that he said, "there is what I give my daughter, but that is not all;" and both added "or words to that effect." It appeared that the daughter was privy to the right she had to the fifth part: it did not appear, but rather the contrary, that her husband knew it at the time, but he became acquainted with it a year after the marriage; yet he never made a demand of it in the life of his wife, who died in 1742, nor in the life of *William Bradford*, who died in 1746. For the defendant (the representative of *William Bradford*) the case of *Wood v. Briant* last stated was cited, and Sir *John Strange*, M. R., said, "As the plaintiff knew of this right in his wife, there is no reason why he should not have made this demand during the time the father-in-law lived after the death of the wife, instead of lying by till after the death of him who was party to the transaction, and might have given some account of it if called upon. To be sure, in cases of this nature, there is no occasion for an express stipulation that the 400*l.* was given in full satisfaction of what came to the parent's hands belonging to the child, and that he does not give it absolutely out of his own pocket. But every case of this kind must be taken with the circumstances, upon which the Court goes, to see, whether, from the nature of the transaction and demand, it is not implied, that the money thus given in the lump, included what the father gave by bounty, and also what came to his hands as belonging to the child. That is the natural transaction; otherwise the Court must suppose he intended to give the 400*l.* out of his own pocket, and suffer himself and his wife to remain still liable to that demand and interest. All the other daughters were advanced in the same way by portions given by *William Bradford* in his life, and never thought they were entitled to their share of that legacy besides, although they by their answer claim it, if the Court should be of that opinion. Their acquiescence and the plaintiff's is strong evidence it never was so understood." The bill was therefore dismissed.

Satisfaction of debt due to a child, by advancement of a portion in parent's lifetime.

In the case of *Chave v. Farrant (m)*, *John Broom*, by his will of the 18th of *July*, 1786, gave to his granddaughters *Mary*, *Sarah*, and *Betty Farrant*, and to each child that should

(m) 18 Ves. 8.

Satisfaction of debt due to a child, by advancement of a portion in parent's lifetime.

or might thereafter be born of his daughter *Sarah Farrant*, and living at his decease, the sum of 150*l.* to be paid to each of them by his executors within six months next after his decease, to whom he gave and bequeathed the same accordingly. The testator died on the 20th of *July*, leaving the three granddaughters named in the will all infants. *John Farrant*, their father, died in 1807, having by his will devised his real estates to his sons, with limitations to their children in tail, and the ultimate remainder to his own right heirs, subject to a trust term of five hundred years, to raise certain legacies and sums of money, and also such farther sum of money as should be sufficient to pay all his just debts, whether on bond, simple contract, or otherwise, after applying his goods and chattels, and the part of his personal estate, after bequeathed in discharge of such legacies and debts, as far as the same would extend; and he gave all the residue of his personal estate to his executors, upon trust to apply the same in discharge of his legacies and debts. The bill was filed by the three granddaughters of the testator *Broom*, with their husbands, claiming their legacies of 150*l.* with interest under his will. The answers by the executors, the widow and sons of *Farrant*, represented, that *John Farrant* maintained, clothed, and educated the plaintiffs, his daughters, at an expense much exceeding their legacies under the will of their grandfather; and he also gave to or in trust for each of them a marriage portion of 1,000*l.*; and no demand was made by any of them in his lifetime, therefore the defendants insisted that the plaintiffs were barred of all claim to recover the legacies under their grandfather's will. Sir *William Grant*, M. R., said, "Upon looking into the settlements, I find nothing from which any inference can be drawn as to the intention of the parties. In Mrs. *Chave's*, her father covenants to pay 1,000*l.* for the portions of his daughter. It does not appear that the husbands knew of the debts. My opinion is, that the father, giving the portion must be taken as meaning to satisfy the debt he owed as executor of the grandfather. That is established in opposition to *Chidley v. Lee* (*n*), by the more recent cases of *Wood v. Briant* (*o*), and *Seed v. Bradford* (*p*). The bill, therefore, as far as it seeks payment of the legacies to Mrs. *Chave* and Mrs. *Poole*, must be dismissed; as to Mrs. *Marson*, her portion is not given, so as to

(*n*) Pre. Chan. 228.

(*o*) *Supra*, Vol. II. p. 1059.

(*p*) *Supra*, Vol. II. p. 1060.

amount to a satisfaction. As to her legacy, therefore, there must be a decree for payment" (q).

Satisfaction of a debt due to a child, by advancement of a portion in parent's lifetime.

In *Phinkett v. Lewis* (r), a trust fund in which a father was entitled for life with remainder to his son and daughter was sold out, and the proceeds received by the father. On the subsequent marriage of the daughter, the father settled property upon her to a greater amount than the proceeds of the trust fund. Sir J. Wigram, V. C., held that the claim of the daughter against her father, in respect of the proceeds of the trust fund, must be presumed to be satisfied by the settlement. After reviewing the authorities referred to in this section, concluding with *Chave v. Farrant*, his Honor added, "they clearly decide that neither the expression of natural love and affection as the reason of the gift, nor the ignorance of the husband of his wife's rights, will necessarily prevent the application of the doctrine of satisfaction," and in a subsequent part of his judgment his Honor observed, "I must not, however, be understood as intimating an opinion that the expression of natural love and affection, as the consideration of a portion given by a parent on the marriage of a child, may not, in any case, be entitled to weight. In the case of a portion being the exact amount of the parent's debt to his child, perhaps it might be material, at least in conjunction with other circumstances; for it might be said, that natural love and affection could not be the motive for discharging a legal or equitable obligation; but that reasoning can have little weight, where the father, as in this case, gives a portion so far exceeding his liability. There is here ample to satisfy the natural love and affection, without excluding the presumption that the debt was intended to be satisfied also."

SECT. IV. Where a legacy by a *creditor* to his *debtor*-legatee does or does not operate as a *release* or extinguishment of the legatee's debt,—and herein of the effect of appointing a debtor executor.

We proceed in the present section, to a review of the cases, wherein a legacy by a *creditor* to his *debtor* has, or has not, been considered to operate as a release or extinguishment of the debt so due to the testator by the legatee (s). It was observed in the commencement of the present chapter, that where a creditor

Where legacy by a creditor to his debtor a release of the debt.

(q) *Hartopp v. Hartopp*, 17 Ves. 184; *Bengough v. Walker*, 15 ib. 507, and reference in note (a), 510.

(r) 3 Hare, 316.

(s) See Chap. VIII. sect. 2, *sup.*, p. 475.

Where legacy
by a creditor
to his debtor, a
release of the
debt.

bequeaths a legacy to his debtor in his will, and either does not notice the debt, or mentions it in such a manner as to leave his intention doubtful, and after his death the securities for the debt are found uncanceled among the testator's property, the Courts of Equity do not consider the legacy to the debtor as necessarily or even *primâ facie*, a release or extinguishment of the debt, but require evidence clearly expressive of the intention to release; if such intention does not appear clearly expressed or implied on the face of the will, evidence from other sources will be admitted. In such cases, however, the Court has felt considerable embarrassment, inasmuch as it has to pronounce upon an instrument that is apparently a disposition of the property, and which ought to be a complete and entire disposition of the property, yet such instrument does not contain evidently, when the circumstances are stated, the whole intention of the testator expressly as to the administration of his property. This difficulty is increased from the circumstance, that one jurisdiction, which cannot receive the evidence that may arise from other papers, and which is not in the habit of receiving that evidence, is to pronounce upon the *ultimatum* of the will, and another jurisdiction is to execute it, and in executing it, is to conform itself as much as possible to the intention of the testator. Hence, as Lord *Loughborough* observes, arises the necessity of admitting that evidence, which has been given in cases where the administration is to be carried on in the Court of Chancery; and all that is to be received from the Ecclesiastical Court is the probate (*t*). These observations arose in the case of *Eden v. Smyth* (*u*), which is an instance wherein the evidence produced was considered as clearly manifesting an intention in the testator to release the legatee's debt.

In that case, *Smyth* the testator, upon the marriage of his daughter with the plaintiff Sir *Frederick Eden*, had made a considerable settlement upon her, and also paid several sums of money to or for the accommodation of Sir *Frederick*. Among other advances, *Smyth* lent Sir *Frederick* 1,000*l.*, for which he took his bond dated 1791. In *January* 1792, a further sum of 1,000*l.* being required by Sir *Frederick*, and it not being convenient to *Smyth* to advance it, he joined Sir *Frederick* in a bond to the Rev. *J. Boucher*, to secure that sum, and which was paid to Sir *Frederick* in 1794. *Smyth* also borrowed 700*l.* of *George Watson*, and paid that sum with 200*l.* more to Sir *Frederick*, who gave *George Watson* his bond dated 10th *July* 1794, for

(*t*) 5 Ves. 355.

(*u*) Ib. 345.

securing the repayment. *Smyth* paid off *Watson's* bond in his lifetime, but did not take any assignment. By his will, dated 1797, *Smyth* did not, as it appears, mention the bond debt of Sir *Frederick*; but among other legacies gave 1,000*l.* to Sir *Frederick Eden* to be paid within twelve months after his decease, or as soon after as his executors conveniently could; and he gave the residue of his personal estate to his younger grandchildren, issue of Sir *Frederick* and his daughter Lady *Eden*. Sir *Frederick's* bonds for 1,000*l.* and 900*l.* were found among the testator's effects. Sir *Frederick* filed his bill for the legacy, and the question, raised by the answers of the executors, was, whether, under the circumstances, he was entitled to the legacy, or on the contrary, was to be charged with 1,900*l.* as due to the testator's estate. Among the evidence produced was a letter from the testator to Lady *Eden*, the mother of Sir *Frederick*, in which the testator said he had released Sir *Frederick* from the sum of 1,000*l.* he had lent him; and among other evidence it appeared that the testator had stated to *Robert Smyth* and other witnesses that he had given the plaintiff the two sums of 1,000*l.* and 900*l.*, and that as to the bonds given for them the plaintiff should never be called upon, and that he (the testator) considered himself bound to pay Mr. *Boucher's* bond. Certain statements of cash accounts were produced; and other papers, which were not proved, mentioned the legacy of 1,000*l.* to Sir *Frederick Eden*, and one in particular, to "Sir *Frederick Eden* 1,000*l.*, if I pay *Boucher* nothing, then," and the words "If I pay *Boucher*" were crossed with a pen. It was contended for the plaintiff, that this legacy, coupled with the letter and other evidence, showed the testator never intended to enforce the demands, and that they were released. The parol evidence, which was urged for the plaintiff, was adduced *not to explain the will*, but to repel a demand, and was admitted *de bene esse*. Lord *Loughborough*, C., considered the evidence very properly admitted from the Bishop of *Peterborough's* case (*v*), in which his books and papers were admitted. The same rule must hold as to any memorandum, to show, what he took as the estate to be disposed of: and was equally applicable to show, what he reckoned debts due to him, and what not, where he has happened to keep any account of his own property. The demand of the plaintiff *primâ facie* was perfectly obvious. That without doubt, upon the face of the will, the legacy was due. The doubt arose upon the papers, found in the

Where legacy
by a creditor
to his debtor, a
release of the
debt.

(v) *Hinchcliffe v. Hinchcliffe*, *infra*, p. 1077.

Where legacy
by a creditor
to his debtor a
release of the
debt.

testator's possession, and which were *prima facie* evidence of debts due from the plaintiff. That it was fair to admit all collateral papers to show the legacy was due; and, taking the whole papers together, he was satisfied, it was the intention of Mr. *Smyth* that these debts should not be demanded by his executors. His Lordship added; "The conclusion, that bears strongly upon my mind, is, that he meant the legacy to Sir *Frederick Eden* beneficially; and consistently with that, he meant, that the residue given over to the children of Sir *Frederick Eden* should not include these three debts; that these three debts should compose no part of that residue, intended to be a provision for the younger children. Therefore decree the legacy to be paid; and that these several bonds for 1,000*l.*, 1,000*l.* and 900*l.* shall not be the subject of demand against Sir *Frederick Eden*."

Where not.

But where the evidence of intention to release the debt is not clear, either by reason of the ambiguity of the expressions in the will, or of the insufficiency of the evidence itself, the gift of the legacy will not of itself amount to a release of the debt. Thus, in the case of *Wilmot v. Woodhouse* (*w*), Admiral *Byron*, in the year 1782, advanced to his daughter *Juliana Elizabeth Byron* (afterwards the wife of the plaintiff Sir *Robert Wilmot*), the sum of 800*l.* for which he took her bond; and in the year 1785 made his will, of which part was in the following words: "As I have paid and advanced considerable sums of money for my son *John Byron* and my daughter Lady *Juliana Elizabeth Wilmot*, I direct that my trustees and executors shall pay, within twelve months after my death, the sum of 2,000*l.* to my said daughter Lady *Juliana Elizabeth Wilmot*." Admiral *Byron* died in 1786; Lady *Wilmot* in 1788; and, as administrator to his wife, the plaintiff filed his bill for the legacy. Upon the question, whether it was to be considered as a release of the bond which remained uncanceled, the Court said, that the introductory words of the bequest were intended as an apology for giving Lady *Juliana Elizabeth Wilmot* less than the testator intended for his other daughters. But the question was, whether they amounted to a release of the bond; and upon this point the Chancellor expressed himself in the following terms: "The inclination of one's mind certainly is, that by these expressions, he did not mean to insist upon the bond. It is argued two ways, that he meant to release it, or that he had forgot it. But his suffering it to remain uncanceled in

(*w*) 4 Bro. C. C. 226; see *Jeffs v. Wood*, 2 P. Wms. 128; *Courtenay v. Williams*, 3 Hare, 539.

his possession, shows that he did not mean to give it up. He might easily have shown his intention so to do, by tearing off the seal. On the other hand, if he had forgot it, there was a total absence of intention with respect to it. A gift of a legacy may certainly be so framed as to be a release of a demand, but it must be clear. But this case can be raised no higher than an absence of intention; and the mere absence of intention can never be construed into a release. My opinion therefore is, that the defendant has a right to have the amount of the bond deducted;” and the decree was accordingly.

Where legacy
by a creditor
to his debtor
not a release of
the debt.

We may here insert the case of *Aston v. Pye* (x). The defendant was indebted to his uncle Sir *Thomas Pye*, by a note of hand for 300*L*, payable at twelve months after date. The uncle made his will, dated the 17th of *August* 1785, and, after his death, the executors found the following entry: “*Henry James Pye* pays no interest, nor shall I ever take the principal, unless greatly distressed.” The date of this entry was subsequent to that of the will. Lord *Kenyon*, M. R., directed a trial at law as to the effect of the entry; and the question was argued in the Court of Common Pleas, Easter Term, 28 Geo. 3, whereupon it was determined, the entry could not operate as a release. It was said in argument, that Lord *Kenyon* said there was no proof of a large surplus. That proof was given at law: and upon a case reserved, the Court was of opinion, this could not be taken as a discharge in the lifetime of Sir *Thomas Pye*, but was testamentary. The cause was adjourned, and time allowed to prove the entry in the Ecclesiastical Court. In Easter term the cause came on again; and the Court being informed that probate was refused by the Ecclesiastical Court, declared, that, as it belonged to the Ecclesiastical Court to say, what was, or what was not, testamentary; and they held, it was not testamentary, it must be considered as a conditional discharge of the debt: the testator never having demanded interest, and having died in affluent circumstances, the executors were not entitled to recover.

It will be proper here to notice the case of *Gould v. Adams*, which occurred in *Ireland* (y).

In that case, *Michael Gould*, in the year 1764, had become security for the plaintiff, and on the 12th of *April* 1780, he was obliged to pay for him 392*L* 10*s*. *M. Gould* had made a will in 1779, wherein he devised an annuity of 100*L* to the plaintiff for life,

(x) 5 Ves. 350, in notis, and 354, per Lord *Loughborough*, C.

(y) Vern. & Scriv. Rep. 258.

Where the will contains an express release of the debt.

but having been obliged to make the payment before mentioned, he made a new will in 1782, and thereby devised to the plaintiff an annuity of only 50*l*. for life. The plaintiff filed his bill to have the annuity decreed a charge upon the lands made subject thereto by the will. The defendants, the representatives of the testator, refused to pay the annuity, until the plaintiff should discharge the debt of 392*l*. 10*s*. The question was, whether the devise was an extinguishment of the debt. *Yelverton*, C. B., said, where a man makes a will and leaves a legacy, it is *prima facie* to be intended a benefit to the legatee; now if the money due by the plaintiff to his brother the testator were to be set off against the annuity, the plaintiff would take no benefit; besides, where there is an annuity devised it is not so proper to allow a set off against it, as if it were a sum in gross: and the annuity was decreed a charge upon the land, and an account to be taken of the arrears. It is presumed that the better opinion is opposed to the last case cited. The case of *Wilmot v. Woodhouse* is an authority to the contrary; and had the general rule been, as stated by *Yelverton*, C. B., there would not have been any occasion in the case of *Eden v. Smith*, to resort to the evidence *aliunde*, to prove that the testator considered the debt as discharged; and the whole of Lord *Loughborough's* argument was incorrect.

In *Hyde v. Neate* (y), the testator gave legacies to several legatees by his will, and by a codicil declared that should certain legatees (naming them) or any other person who had a legacy left them by any will, owe him any sum or sums of money at his decease, it should be considered as part of their legacy. *I. T. N.* one of the legatees whose legacy was 100*l*., owed the testator 4,000*l*. Exceptions were taken by *I. T. N.* to the Master's report, who expressed his opinion that the testator did not by his codicil intend to release *I. T. N.'s* debt; and Sir *L. Shadwell*, V. C., allowed the exceptions; and, observing upon the ignorant penning of the codicil, written by the testator himself, expressed his opinion that the words could not be construed in any other method than as meaning, that if any person owed the testator any thing, the debt should be considered part of the legacy, in the sense, that the legatee should take both the legacy and a remission of the debt.

The cases, wherein the testator expressly forgives or releases the debt of his creditor, do not of course fall within the present

subject: the reader is therefore merely referred to some of the leading authorities on that subject in the note below (z).

Where the will contains an express release of the debt.

It may be proper to notice in this place, that, where a creditor forgives or bequeaths a debt due to him by the legatee as one of two or more joint debtors; as, for instance, where the obligee bequeaths the sum due to him by one of two joint obligors of a bond, it is not a release to the other of the two obligors, but is only a personal legacy to him, whose debt is so forgiven, and will lapse by the death of the legatee in the testator's lifetime, so that his personal representatives will still be liable (a).

Where a testator recites that a legatee is indebted in a certain sum which he forgives him, that recital binds the legatee, except in the case of a clear mistake of figures; and the legatee must elect to take under or against the will; and he is not at liberty to claim as a legacy out of the assets so much, as with the debt he alleges only due, would make up the amount of the sum stated to be due by the testator (b).

But a mere declaration of a testator to his bond creditor, that he would not sue for the money, is not sufficient to constitute a release; but if such declarations were reduced into writing by a testamentary paper, they might operate as a gift to him of the money due upon the bond (c).

In close connection with the preceding consideration, though perhaps not strictly within the professed subject of the present Treatise, a brief summary may with convenience be introduced of the leading principles of Law and Equity respecting the consequences of a creditor appointing his debtor to be his executor. It is settled, that at law it shall be a release or extinguishment of the debt: because the executor cannot maintain an action against himself. The appointment by the creditor to the office discharges the action, and consequently, with it, the debt; which is merely a right to recover the amount by way of action (d); As, for instance, where an obligee on a bond appoints his obligor his executor. The law is the same, where the executor is one of two or more joint and several obligors (e); or where the debtor

Of the effect of creditor appointing his debtor his executor at law a release.

(z) *Sibthorp v. Mazom*, 3 Atk. 581; *Elliott v. Davenport*, 2 Vern. 521; *Toplis v. Baker*, 1 P. Wms. 82, n. (2); *Att. Gen. v. Holbrook*, 3 Yo. & Jerv. 114.

(a) *Izon v. Butler*, 2 Price, 34; *Maitland v. Adair*, 3 Ves. 231.

(b) *Robinson v. Bransby*, Mad. & Geld. 348.

(c) *Reeves v. Brymer*, 6 Ves. 519, per Master of the Rolls.

(d) Salk. 299; Com. Dig. Administration, B. 5; 2 Bl. Com. 511, 512; *Freakley v. Fox*, 9 Bar. & Cress. 130.

(e) Office of Exec. 11, 31.

Of appoint-
ment of debtor
to be executor.

is one of two or more executors (*f*). Nor, if such creditor executor die, can the surviving executors bring the action against his representatives, though he died before probate (*g*). But if such executor formally *renounce*, the law is otherwise (*h*).

in equity not.

The appointment of an executor is an act of the testator, and at law the release is an absolute discharge (*i*); but administration granted to the debtor is an act of law, and a *suspension* only of the right of action, which may revive again (*j*). But though the appointment of a debtor to be executor is a release at *law*, in *equity* the rule is otherwise well settled (*k*), and an appointment of a debtor to be executor is not there considered a release, unless a clear intention appear; since it belongs to the jurisdiction of that Court to administer the assets of the testator according to his intention, and the equitable claims of those who have demands upon those assets. In *Errington v. Evans* (*l*), the question was, whether a bond debt due to the testator from one of the defendants, who was one of the executors and proved the will, was extinguished; and it was held, that, where an obligee makes an obligor one of the executors, and takes no notice of the bond, but devises the residue of his estate to others, it is not an extinguishment; though at law it would be so, because a personal demand once suspended was not to be resumed. A similar determination took place in the case of *Phillips v. Phillips* (*m*).

The executor will be a trustee of the debt for the residuary legatee (*n*), or for the next of kin (*o*), according to the circumstances of the case.

(*f*) Office of Exec. 11, 31.

(*g*) Ib. & Salk. 300.

(*h*) Ib. 307.

(*i*) 2 Dick. 456.

(*j*) Salk. 302; Cro. Car. 373.

(*k*) *Berry v. Usher*, 11 Ves. 90, and note.

(*l*) 2 Dick. 456.

(*m*) Cha. Ca. 292, and 2 Freem. 11; see also Harg. Co. Lit. 264, b., note (1).

(*n*) *Brown v. Selwin*, For. 240.

(*o*) *Carey v. Goodinge*, 3 Bro. C. C. 110; see also Vol. I. chap. ix. of this work.

CHAPTER XVIII.

Of the Satisfaction of Portions by Legacies.

WHERE a parent is under obligation, by articles or settlement, to provide portions for his children, and he afterwards, by will or codicil, makes a provision for those children, it is a well-established rule of equity, that such subsequent testamentary provision shall be considered a satisfaction or performance of the obligation. We have seen, in the preceding chapter, that upon questions of satisfaction of *debts* by legacies, trifling points of difference (a) between the debts and legacies were adjudged sufficient to repel the presumption of satisfaction; but, with respect to the satisfaction of *portions*, the rule of presumption is much more favoured; the inclination of the Court of Equity being against raising *double portions*. If, therefore, the legacies be *less* in amount than the portions, or *payable at different periods*, the legacies will, notwithstanding, be considered satisfactions, either in full or in part, according to circumstances. But, though these circumstances of difference are considered insufficient to rebut the presumption of satisfaction, yet, where the legacy is *contingent*, or given with a view to some other purpose, the rule of the Court is different, and such legacies are not considered as a satisfaction. The inclination, however, is so strong against double portions, that it has been decided, that although no legacy is given by a will, yet if, by the intestacy of the parent, a distributive share of his personal or any real estate devolves upon the child, of equal or greater value than the portion, it shall be a satisfaction of the portion. We proceed, therefore, to consider—

SECT. I. Those cases wherein the testamentary provision is considered a satisfaction of the portion; and herein of parol evidence.

SECT. II. The cases wherein such provision has not been so considered, where the testamentary provision was *contingent*, or given for a *different* purpose.

(a) *Hartopp v. Hartopp*, 17 Ves. 191.

Where testamentary provision a satisfaction of a portion.

SECT. III. The cases wherein a testamentary provision has been considered an *advancement* in the lifetime of the parent.

SECT. IV. The cases where the distributive share of personal or a real estate of equal or greater value, belonging to the parent, devolves upon the child.

SECT. I. Where the testamentary provision has been considered a satisfaction of the portion.

Where testamentary provision a satisfaction of a portion.

In *Bruen v. Bruen* (b), a term by marriage settlement was vested in trustees, to commence after the death of the father and mother, in trust to raise 3,000*l.* within twelve months after the death of the survivor, for daughters' portion. There being issue one daughter only of the marriage, the father, by his will, devised the trust lands, to make good his wife's jointure of 200*l.* a year, and for raising 3,000*l.* for his daughter's portion: and it was decided, that the will should be taken as relative to the settlement, and construed as for the better securing the 3,000*l.* by the settlement, and not as a devise of another 3,000*l.*

In *Moulson v. Moulson* (c), by marriage settlement, 1,100*l.* of the wife's fortune was to be advanced to the husband for the purposes of his trade; for which he secured to her an annuity of 100*l.* after his death. The remainder of her portion was vested in trustees, to be divided after the death of the husband and wife among the children, according to the wife's appointment; and in default thereof, among all, with a variety of provisions for events which did not happen. The husband, having afterwards very much increased his fortune, made his will, taking notice of the settlement as to the annuity only, and directed, that the wife should relinquish her right under the settlement. He then gave 10,000*l.* to his executors, which he ordered to be laid out, and the interest paid to his wife while sole, and gave her a power to dispose of the 10,000*l.* among the children; but if she made no disposition, they were to take the whole. The wife relinquished her right under the settlement: and the question was, whether the children took such an interest as should be a satisfaction for

(b) 2 Vern. 439; see also *Blois v. Blois*, 2 Chan. Rep. 347.

(c) 1 Bro. C. C. 1077.

what they would have taken under the settlement ; and *Eyre*, Baron, said : “ If there be a provision on failure of the wife’s appointment, they take a larger interest than under the settlement, and if more beneficial, it must be a satisfaction. The intent was, that the wife should relinquish for the children, as well as for herself ; and although she could not do so, it shews he intended it to be done, and then the Court must do it. It must, therefore, operate as a satisfaction.”

Where testamentary provision a satisfaction of a portion.

Again, in *Copley v. Copley* (d), Sir *Godfrey Copley*, the grandfather, settled his estate upon himself for life, remainder to his first, &c., son in tail, with a proviso, that if his son *Godfrey* should die without issue male, and leaving a daughter, the trustees should raise out of part of the premises 5,000*l.* to be paid to her within a year after her marriage, or at twenty-one, which should first happen. In 1681, and after the death of Sir *Godfrey* the father, Sir *Godfrey* his son, pursuant to articles on his marriage, among other premises, settled those charged with the 5,000*l.* on himself for life, remainder to his first, &c. son in tail male, remainder to trustees for two hundred years, in trust to raise 8,000*l.* for daughters’ portions, if no issue male, payable at eighteen, if then married, or at any time afterwards when married. In 1709, Sir *Godfrey*, the son, having no issue male, devised all his lands to the defendant in tail male, charged with his legacies, and gave to the plaintiff, his daughter *Catherine*, for her portion, 8,000*l.* ; 4,000*l.*, part of it, to be paid at eighteen, and the remaining part within a year after marriage, or, in all events, at twenty-one, and devised to her 150*l.* a year until eighteen, and afterwards 200*l.* a year for life. The plaintiff, *Catherine*, filed a bill in Chancery for the sums of 5,000*l.*, 8,000*l.*, and 8,000*l.* ; insisting, that as none of them were given in satisfaction of the other, and it being the case of an heir-at-law, and the sums payable at different times, some less beneficial than others, therefore all the sums, or at least the 5,000*l.* and 8,000*l.*, given by her grandfather and father, should be paid. But *Harcourt*, Lord Keeper, declared, that the plaintiff was entitled only to one portion and maintenance under the grandfather’s settlement, and by the settlement and will of the father. “ The will,” said his Lordship, “ expressed, that the 8,000*l.* given by it was for the plaintiff’s portion, and this 8,000*l.* and the annuity of 200*l.* for her life, seem the most beneficial. But it is a hard demand

(d) 1 P. Wms. 147, commented upon by Lord *Alvanley*, M. R. in *Hinchcliffe v. Hinchcliffe*, *infra*, 1077.

Where testam-
entary pro-
vision a satis-
faction of a
portion.

in equity, when only *one* portion is intended for the plaintiff, that she should be suing for *three*. Wherefore, as the plaintiff has no remedy to recover any of her portions but in a Court of Equity, she shall not recover more than was intended. But, being an infant, she shall not by this decree be precluded from electing the portion by the marriage settlement, if she, when she comes of age, thinks that more for her advantage. However, she shall not have two portions instead of one."

In *Ackworth v. Ackworth* (e), before marriage, a sum of money, partly belonging to the husband, and partly to the wife, was settled upon the husband for life; remainder to the wife for life, remainder to the children, to be equally divided among them. There were several children, and the money amounted to no more than 2,400*l*. The father afterwards made his will, and gave each of the children 2,000*l*., and the residue of his estate among them. Lord *Bathurst* decreed, that what the children took by the will, should be in lieu of their portions under the settlement.

In *Byde v. Byde* (f), *R. S. Byde*, having issue, a son, by a former wife, by settlement in 1699, upon his second marriage, settled lands on himself and his wife for their lives, remainder to trustees, to sell the same to his son by the former marriage for 5,000*l*. as a provision for the children of the second marriage. Afterwards, *R. S. Byde* having three children, and his wife being *enceinte*, by will in 1705, gave 1,000*l*. to each of the three children by the second marriage, by name, as and for his and her portion respectively, and 1,000*l*. to the child of which his wife was *enceinte*; and charged his lands with these portions. After his death, his son paid the 1,000*l*. portions, and accepted the purchase. The wife having died in 1755, the plaintiff, the only surviving child of the marriage, filed the bill to have the purchase completed, and for payment of the 5,000*l*. in addition to the portion in the will. Lord *Northington* thought the testator meant to give each child an election, and that by accepting the legacies, they had elected to take under the will. He therefore dismissed the bill, without costs.

In the Duke of *Somerset v. Duchess Dowager of Somerset* (g), Sir *Edward Seymour*, by marriage articles in 1716, agreed to settle estates at *Berry Pomeroy* upon the plaintiff's father, charged with the following portions for younger children, *viz.* 4,000*l*.

(e) 1 Bro. C. C. 307, note.

2 Eden, C. C. 19; 1 Cox, C. C. 44.

(f) 1 Bro. C. C. 308, note, S. C.;

(g) 1 Bro. C. C. 309, note.

each for one or two; or 12,000*l.* to be equally divided between three or more children, payable at twenty-one or marriage, which should first happen after the death of the father; besides which he agreed to advance 1,600*l.* to be laid out in lands as an additional jointure for the plaintiff's mother, and for the benefit of her issue male. Sir *Edward* died in 1740, whereupon the plaintiff's father took under the articles, and afterwards, in 1757, died, leaving the plaintiff, his eldest son, and the defendants his widow and younger children. But the plaintiff's father by his will made fresh provisions for every branch of his family, and gave to his three younger sons 5,000*l.* a piece, and to his daughter the third part of his *Worcestershire* estates, or 8,000*l.* in lieu thereof, with cross bequests between his sons and daughter, in case of any of them dying under twenty-one, and charged the whole upon his estates at large, which he devised to the plaintiff his eldest son, with remainders over to his younger sons successively in tail male. The plaintiff filed his bill, praying, among other things, that his younger brothers and sister's husband might elect to take under the articles or will, and two of the defendants submitted, whether they were compelled to make their election, but if so, preferred to take under the will; and the Lord Chancellor directed all the defendants to make their election.

Where testamentary provision a satisfaction of a portion.

In *Warren v. Warren* (*h*), *John B. Warren*, the father of the plaintiff Sir *John B. Warren*, by settlement in 1754, conveyed his estate to trustees to the use of himself for life, remainder to his wife for life, remainder to trustees for a term of years to raise 10,000*l.* for younger children, remainder to his eldest son in tail with remainders over. In the settlement a power was reserved to the settlor, *J. B. Warren*, to raise money, but subject to the wife's life estate and the provision for the children; also a proviso, that if he should, in his life, give to any of his younger children any sums of money towards their portions and advancement, and declare the same by writing to be in part of their portions, they should go in satisfaction *pro tanto*. *J. B. Warren* by his will, in 1758, reciting *that he had made no provision for his wife* by settlement or otherwise, declared it to be his will, that the trustees should pay her 600*l.* a year for life in bar of dower; and if he should have one younger child only, they should raise 5,000*l.* for such child, but if more than one 2,000*l.* each, which he charged upon his personal estate, and in case of a deficiency upon his settled estate. He died in 1763, leaving the plaintiff

(*h*) 1 Bro. C. C. 305.

Where testam-
entary pro-
vision a satis-
faction of a
portion.

his eldest son, and two of the defendants his younger children. The bill prayed, that the two younger children might be declared to be entitled to one only of the two provisions, and that upon payment to them of 5,000*l.* each, the term should be assigned. Lord *Thurlow*, C., said, "A great number of cases have been cited, to shew that the Court leans against double portions; but I have not found that it would do as a distinct rule, that where a parent had made a provision by will for a child, whom he had afterwards provided for in marriage, it is *primâ facie* a satisfaction (i). If it be so *primâ facie*, the Court should on all occasions examine whether there be ground enough to repel the presumption. I will try if I cannot, from the case, draw a rule without resting on the Court's leaning to or against double portions; the Court ought to go on more precise rules." Lord *Thurlow*, not having pronounced judgment in the cause, it was re-argued before the *Lords Commissioners*, after which Lord Commissioner *Ashurst* delivered the opinion of the Court, that the 2,000*l.* given by the will, should go in satisfaction of the provision by the settlement. He observed that the rule was, that whether the sum were greater or less was immaterial, but in the latter case it should only be a satisfaction *pro tanto*; if the testator had forgotten the prior provision, it was admitted the bequest ought to go in satisfaction; and that they ought to suppose that he had forgotten it, as the testator shewed he had as to his wife, which made it probable he had also forgotten the other. A further reason for the supposition was, his giving the interest of the 2,000*l.* for maintenance. It was decreed, therefore, that the 2,000*l.* was in part satisfaction, and that upon the payment of the 5,000*l.* each, the surviving trustee was to assign the term.

In *Finch v. Finch* (k), *Elizabeth Finch*, in 1757, by indenture, in consideration of natural love and affection, and to advance her son, *Saville Finch*, in the world, and for settling certain estates, granted the estates at *Brimsforth* and *Rotherham*, in *Yorkshire*, and at *Twade*, *Bobbin*, *Milton*, and *Newington*, to the use of *S. Finch*, for life, remainder to trustees, to preserve contingent remainders, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to the use of her (the settlor's) daughter, *M. Finch*, for life, with the like remainders, and with the ordinary powers of leasing and jointuring. In 1759, *Elizabeth Finch*

(i) See the observations of the Master of the Rolls, upon Lord *Thurlow's* sentiments, *Hinchcliffe v. Hinchcliffe*, *infra*, p. 1077; see also

Upton v. Prince, *supra*, p. 369; *ex parte Pye*; *ex parte Dubost*, 18 Ves. 151.

(k) 1 Ves. jun. 534.

entered into an agreement with her son, to convey to him the family house at *Frybourg*, and all the rest of the *Yorkshire* estate, of which she was in possession, except a part called *Bramley*, and to deliver actual possession to him upon certain terms, with an express stipulation, that when he should, upon her death, be in possession of certain estates in *Kent*, (of which she was then tenant in tail), he should pay his sister *Mary* 20,000*l.* “for her fortune and portion.” There was in the same year, a subsequent agreement, regulating the time and manner of his taking possession, and respecting the receipt of rents and profits; which agreement contained an exception, respecting the estates at *Brimsworth* and *Rotherham*, not otherwise material than as it was made use of to show an intention to pass that part, as well as the rest of the estate, under the prior agreement. *Elizabeth Finch*, by her will, in 1764, gave all her freehold lands, &c., and all her personal estate to her son, but charged with a legacy of 20,000*l.* to her daughter, “for her portion, fortune, and advancement;” and made her son executor. In 1767, the testatrix died. The 20,000*l.* given by her will, was paid to her daughter, the plaintiff; and one of the questions was, whether she was also entitled to the 20,000*l.* under the agreement of 1759: and it was adjudged by Lords Commissioners *Eyre*, *Ashurst*, and *Wilson*, that she was not. *Eyre* observed, that there being an express devise to the daughter of 20,000*l.* *for and in the name of a portion, fortune, and advancement*, that seemed to him to destroy every pretence and argument in equity, for raising any sum under the agreement; and the sum and the object being precisely the same, *i. e.* by way of fortune and advancement to the daughter, afforded a strong ground of positive intent, that the daughter should take no benefit under the agreement; that it had been observed by Lord Commissioner *Wilson*, that the will, though it contained no express reference to the agreement, yet, in fact, giving the same sum for the same purpose, was to be considered, *pro tanto*, as an execution of the agreement: if so, the sums were one and the same 20,000*l.*; which went to the root of the claim, and destroyed it.

In *Hinchcliffe v. Hinchcliffe* (1), Doctor *Hinchcliffe*, (afterwards Bishop of *Peterborough*), at the time of his marriage with *Elizabeth Crewe*, was possessed of a leasehold house in *Conduit-street*, held for a term of twenty-eight years, under a lease renewable every fourteen years, on payment of a fine. He was

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(1) 3 Ves. 516, approved of by *Druce v. Denison*, *infra*.
Lord *Eldon* in *Pole v. Lord Somers*,

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also entitled to an annuity or rent-charge of 300*l.* payable for his life by *John Crewe*, brother of *E. Crewe*. *E. Crewe* was entitled to 6,000*l.*, secured by two bonds. By indentures of *May* 1767, in pursuance of an agreement previous to the marriage, *John Crewe*, in consideration of the surrender of the grant of the said annuity, granted to *E. Crewe* the intended wife, an annuity of 300*l.* from the solemnization of the marriage, for ninety-nine years, in case she should so long live; and by another indenture of the same date, the said leasehold house, the annuity and the sum of 6,000*l.*, together with the said bonds, were assigned to trustees, in trust, after the marriage, during the joint lives of Doctor *Hinchcliffe* and his wife, to raise and pay the yearly sum of 80*l.* to the separate use of *Elizabeth*; and, subject to the annuity, to permit Doctor *Hinchcliffe* to receive the rents and profits of the leasehold premises, he paying the fine of renewal, and also the interest of the 6,000*l.* for his natural life, and also the annuity of 300*l.* during the joint lives of him and his intended wife; and after his decease, in case she survived him, and there should not be three or more children then living, upon trust to permit her to receive the rents and profits of the leasehold premises, and the annuity during her life; but in case there should be three or more children then living, then after the death of Doctor *Hinchcliffe* to assign the leasehold premises, and the 6,000*l.* together with the securities in which the same should be invested, to and among all such children equally, payable to a son or sons at twenty-one, and to a daughter or daughters at twenty-one, or marriage with consent of their father, if living, or if dead, of the trustees and their mother: provided, that notwithstanding the postponement of the assignment of such shares till after the death of the father, every share should be considered as vested in a son at twenty-one, in a daughter at twenty-one, or marriage with such consent; with a provision for survivorship, maintenance after the death of the father and mother, and for advancement, as the husband and wife, or the survivor, should under hand and seal, with two witnesses, appoint; such advancement to be taken as part of their shares of the trust funds; and if the father or mother should advance any of them out of their own money, then they or their respective executors should receive out of such child or childrens' shares so much, and the same should be deemed as part of such child or childrens' shares of the trust premises, in case he or she should by writing under his or her hand so declare, and not otherwise. It was further provided, that upon the requisition of the husband and wife, or the survivor,

the leasehold premises should be sold, and the 6,000*l.* be invested in other securities upon the same trusts. The marriage took place; and there was issue two sons and three daughters. The Bishop of *Peterborough* received the 6,000*l.* due on the two bonds; and invested 5,425*l.* 17*s.* 8*d.* part thereof in a mortgage of an estate, called *Breton Ferry*: he also sold the leasehold house in *March* 1786, for 1,050*l.* the trustees not being consulted. He purchased 2,050*l.* 15*s.* *Irish* debentures; whereby certain annuities were made payable to him, his executors and administrators, depending upon the lives of his two sons and his daughter *Frances*; and another *Irish* security for a similar annuity for the life of his daughter *Emma Duncombe*; the whole of which *Irish* annuities were of the annual value of 134*l.* He also purchased two *French* annuities of 100*l.* each; the one depending upon the lives of his wife, and his daughters *Emma* and *Frances*; the other upon the lives of his wife, and his daughter *Charlotte*. By his will, in *December* 1793, he gave to *John Crewe* and *Benjamin Barnard* all his estates and personal property, in trust to pay his debts and funeral expenses, and then to pay his wife 500*l.*; and further to pay her annually for life, 200*l.*, being the produce of an annuity upon her life, purchased of the Duke of *Devonshire*, in addition to an annuity of 300*l.* settled upon her at her marriage, and payable by *John Crewe*, her brother, or by his heirs; and also to pay his wife for life the produce of two annuities in the *French* funds of 100*l.* each; and further to pay the produce of all the *Irish* tontine annuities during her life to her own use; and after her death, in trust to pay to his daughters respectively for their lives, the sum arising from the tontine annuities during their respective lives; and in case they, or either of them should marry, the tontine annuity of such daughter so marrying was to be held for her separate use and appointment, not liable to the debts of her husband. He then proceeded, "I will my sons to have each his tontine annuity upon the death of their mother, in trust also to pay the interest of 3,000*l.* owing to me upon mortgage by the Duke of *Grafton*, which interest is not to be paid, but for the rent of my house in *George-street*; which house, I will that my wife have the use of for her life, or widowhood, together with the use of all my furniture, plate, linen, pictures and liquors, an inventory being taken of the several articles, and lodged with my executor, so long as she remains unmarried: should she marry again, I will that the 3,000*l.* specified to pay the rent, be divided equally among my three daughters, who may be then living, in addition to what else

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shall be bequeathed to them: but if one, two, or all of them be dead, and have left issue, then, what would have been the mother's share, I would have paid to the representative or representatives of each." The testator then declared, that the lease of his house in *George-street*, household furniture, pictures, linen, and plate, and specified in a schedule, together with what liquors might remain, should become the property of his eldest son, or in case of his death before the death or marriage of his mother, the property of his (the testator's) son *Edward*. He then continued. "I will also that my executor, with consent of my trustees, or the survivor of them, may have the power to call in, for the purposes of my will, all monies in the funds, lent upon mortgage, bonds, or otherwise, and to sell the leases of all my houses, except that in *George-street*, so long as my widow continues to live unmarried; again, I will also that the tontine *Irish* annuities shall not be sold during my wife's life, nor the annuity upon my wife's life, payable by the Duke of *Devonshire*, in trust to pay the sum of 6,000*l.* to my son *Edward*. I will also, that each of my daughters as they shall respectively attain the age of twenty-one, or be sooner married with consent of their mother and my trustees, or the survivor of them, be paid the sum of 4,000*l.*, and until my daughters shall attain the age of twenty-one, or be married with the consent before required, my will is, that to each be made an allowance, as the trustees and executor may think fit, for her maintenance and education. It is my will also, that after the death of my wife, the interest arising from the *French* annuities, of that standing in the names of *Emma* and *Frances Hinchcliffe*, shall be paid to them; of the other, standing in the name of my daughter *Charlotte*, be paid to her. I will, that the annuities themselves be unalienable, and to remain in trust as is directed in regard to the *Irish* tontines. After giving some legacies, the testator left to his eldest son *H. J. Hinchcliffe*, whom he also appointed sole executor, the residue of his whole fortune, except his sermons and books of divinity, which he directed to be delivered to his son *Edward*. The testator died in 1794. The bill was filed by the younger children; praying, that they might be declared entitled to the benefits provided for the younger children by the settlement, as well as to all the benefits given them by the will. The eldest son by his answer insisted, that from the year 1778 to 1781, and from 1784 to 1793, and, as he believed, in the interval, his father kept regular accounts of the amount and particulars of his property, and of his debts, and the progressive increase or decrease of his

property, by reference to such debts and otherwise, from one half year to another; and in such accounts he regularly set down the money due upon the mortgage, as part thereof; the interest of which mortgage he regularly received, without the intervention of the trustees, and gave receipts in his own name; and the leasehold premises were also comprised in such accounts, as part of such property, until sold by the Bishop in 1786; and from that time the produce was brought into the accounts, and was intermixed with and constituted part of the said property, as appeared by the accounts in the Bishop's handwriting. The defendant also insisted, that the testator having kept such accounts, and blended the trust property with his own, and calculated upon the whole together without any distinction, made such disposition of the same by his will, as therein contained, and that it clearly appeared, as well from the state and amount of his property, as from the accounts so kept, and provision made thereout for the plaintiffs by his will, and the legacy bequeathed to the defendant's mother, that the testator did not intend to give the plaintiffs double portions; but intended the portions by the will to be in lieu and full satisfaction of their respective interests under the settlement. The accounts referred to by the answer, were books in the testator's handwriting, stating his property and his debts, and comprehending the household premises in *Conduit-street*, the mortgage upon the *Breton Ferry* estate, and the annuity. The question was, whether, under the above circumstances, the provisions for the younger children by the will were a satisfaction of the portions under the settlement, and how far the books of account were admissible in evidence. Lord *Albanley*, M. R. in giving judgment, said: "This cause has stood a considerable time; and the greatest doubt I had was, how far certain memorandums, a state of the testator's property, as drawn out by himself, could or could not be admitted in evidence in any degree to affect the question now under consideration? Upon consideration of all the cases, and the principles upon which they are determined, respecting the intention of the testator in giving a portion by his will to a child already provided for by settlement, I am of opinion, that without intrenching upon any of the rules respecting evidence, of which I am as jealous as any Judge that ever sat in a Court of Equity, this state of his property is evidence, and is very material: at the same time I do not mean to have it understood, that I decide entirely upon that; for independent of that, the facts themselves, together with the rules, as applied to settlements and wills providing portions for children, are sufficient to shew the intention,

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that the provision by the will should be a satisfaction of the portions provided by the settlement. The books would be evidence, if only to prove the fact of the disposition of the house." His Lordship continued: "This is evidence not for the purpose of explaining the will itself, for which it is clear it cannot be admitted, but to shew the circumstances, under which he made his will. The bill claims both the provisions under the settlement and the will; to which it is answered, that according to the principles of construction of the will of a parent, where portions are provided by a settlement, it ought to be taken in satisfaction; and under all the circumstances of this case, I am of that opinion. It was extremely well argued; and every case that could bear upon it was very fully observed upon: but it was said, that of late, that doctrine which appeared established respecting double portions, had received some discountenance from Lord *Thurlow*; and that he had, in *Warren v. Warren* (m), and some other cases, hinted a disapprobation of it. From the whole of those cases relied on to prove that, I see clearly that he never did mean to say, such a rule does not obtain in this Court; that a portion provided by the father is to be *primâ facie* intended as a satisfaction. It is very true, that speaking chiefly of the *ademption* of a legacy, by the advancement of the parent afterwards, he laments that the Court has carried it so far as to go in some cases against the intention: but so far from saying, that the rule is not established, he says, it is too late to say, it is not the rule now; though it is frequently carried even against the intention. I never found that he meant to break through the rule." After discussing the preceding cases, his Lordship continued; "All the circumstances are extremely strong to fortify what I take to be the rule; that if portions are provided by any means whatsoever, and the parent gives a provision by will for a portion, it is a satisfaction *primâ facie*, and unless there are circumstances to shew it was not so intended; and nothing is more clear, than that these are meant for portions. Maintenance is given by both. Though this is not the case of an eldest son having an estate upon which portions are charged, yet the defendant is, as Lord *Loughborough* says, general representative in land or money, upon whom the burthen of the portions would fall." At the conclusion of his judgment, his Lordship observed, "It is impossible to doubt, that the Bishop did conceive he had a right to dispose of all the property he there describes as his

(m) *Supra*, p. 1075.

own, in satisfaction of this settlement. It is impossible not to say, he thought the settlement had not specifically bound this property. The bill, therefore must be wholly dismissed. I desire to be understood, that the books I have admitted, are upon the question of *election* (n); upon which question, I take them to be admissible; but not to explain the will." On the case just stated, Lord *Eldon* observes (o), that the evidence was admitted to prove what had become of the property: and that what had been done would make it necessary for the Court to construe the will as affording a presumption that the settlement was not to be acted upon. That was a question of satisfaction.

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Again, in the case of *Sparkes v. Cator* (p). By settlement in 1765, previous to the marriage of *Joseph Sparkes* and *Mary Cator*, *J. Sparkes*, for the consideration therein mentioned, covenanted to execute two bonds; one for the payment of 4,000*l.* within three years after the marriage, the other in the penalty of 4,000*l.* with a condition that so soon as he should become possessed of the two sums of 1,000*l.* each therein mentioned, he would pay the same in trust that he might receive the produce for life; and after his death, if his wife survived, and there should be issue living at his death, as to 2,000*l.*, part of the 4,000*l.*, in trust for his intended wife absolutely; and as to the remaining 2,000*l.*, to pay to her the interest for life, and after their several deceases, if they should have but one child, in trust for that only child; and if more than one, for all their children living at the survivor's death, in equal shares; and as to the two sums of 1,000*l.* each, upon trust to pay the interest to the husband for life; and after his death, if his wife survived, to her for life; and after their deaths, upon the same trusts for the children as before. The marriage took place, and the bonds were executed. *Joseph Sparkes*, by his will, in 1786, gave to his son *John* 800*l.*, to be paid at twenty-one; adding, "which, with 700*l.* which I advanced for him as an apprentice fee, makes his legacy equal to those hereafter given to my three other sons." He gave his daughter *Harriet* 2,000*l.*, to be paid at twenty-one, or marriage with the consent of his wife, if living, or his executors if she were dead, or of such as should be appointed by her agreeably to a power afterwards vested in her. He gave his three sons, *George*, *Joseph* and *Henry*, 1,500*l.* a piece, to be paid at twenty-one; but declared, that what sums should be advanced to each son in the

(n) See Lord *Eldon's* observations upon this passage, in *Pole v. Lord Somers*, 6 Ves. 325.

(o) *Ib.*

(p) 3 Ves. 530.

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meantime by him, his wife, his executors, or such persons as should be appointed by her under the power, should be deducted from his legacy. He gave his four sons the further sum of 1,000*l.* a piece, payable after the death of his wife, and *within three months afterwards* to such of them as should be twenty-one; and to the others, when they should attain that age. He gave his daughter *Harriet* the additional sum of 2,000*l.*, to be paid *within three months* after his wife's death, if then twenty-one, or married with his wife's consent; if neither, to be paid to her when twenty-one, or married with such consent as aforesaid: and if any of his children died before his wife, without issue, their legacies were to go to the survivors. The remainder of his estates and effects, except what by his will he might give to the child his wife was then *enceinte* with, or might be *enceinte* with at his death, he gave to his wife to dispose of, she being a widow, among all or such of their children, or their issue, as she should think proper, during her life or by will; and in default thereof, such remainder, or so much as should be unappropriated at her death, to be equally divided among such of their children as might be then living, and the issue, if any, of such as might have died during her life; the issue of each deceased child to have an equal share with those who should survive his wife, to be payable at the same times as the original shares. He appointed his wife executrix, and appointed his brother and brother-in-law executors, upon her marriage or death, without appointing executors under the power given to her. Then reciting, that his wife had been brought to-bed of a daughter since he began his will, he bequeathed to his said daughter the like legacies as before given to his sons, *viz.* 1,500*l.* and 1,000*l.*, and that she should have an equal share with them in his estate and effects, in the event of his wife's marriage, or her dying without a will, and an equal benefit of survivorship with his other children: such legacies and shares to be paid at such times, and under such limitations respecting marriage, as his daughter *Harriet's* shares and legacies. By a codicil in 1789, the testator varied the legacies given to his daughters. By another codicil, he revoked the legacy of 800*l.* given to *John*, having advanced 1,000*l.* for his benefit. The testator died in 1790. His widow continued unmarried, and died in 1794, leaving the six children named in the above will. By her will, she gave all the money arising after the payment of all her debts, and the legacies under her husband's will, to be equally divided among her three sons and youngest daughter, *George, Joseph, Henry* and *Juliana*. *John* and *Harriet* received

their legacies, and *Harriet* married *Heapy*. The bill was filed by *George, Joseph, Henry* and *Jubiana*, praying (among other things) that the legacies given by their father's will to *Harriet*, and the sums advanced by the testator to *John*, with the legacy given to him, should be taken as a full discharge and satisfaction of what they would be entitled to under the marriage settlement. The Master of the Rolls said, that the case was upon the same ground as *Hinchcliffe v. Hinchcliffe*, and was a stronger case. The question was, whether there were any circumstances in the provision made by the will, different from that by the settlement, to show the one was not intended to be in lieu and satisfaction of the other. It was within the principle of *Lee v. D'Aranda* (q), and those cases, where a man has covenanted to do a thing, and has done something tantamount to it. When it was a question between parent and child, small circumstances were not sufficient to repel the presumption which, with regard to third persons, would be sufficient. In that case, there was nothing but the circumstance of making the payment three months after the death of the wife, instead of at her death. The provisions by the will were much greater than by the settlement. Upon the will, there were many circumstances to show the testator could not have intended them to have both. The slight circumstance of their being payable within three months after the death of his wife, instead of immediately upon her death, could not make a difference, to show he did not mean a satisfaction of a covenant, which was literally fulfilled, and more. The principles of *Haynes v. Mico* (r) could not be considered as applicable; and he decreed it a satisfaction.

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In the case of *Pole v. Lord Somers* (s), by settlement in April 1751, prior to the marriage of *Reginald Pole* and *Ann Buller*, the fortune of *Ann* consisting of several funds amounting to 3,500*l.*, was directed to be paid to trustees; and *R. Pole* covenanted with the trustees to do all acts for empowering them to receive the monies, upon trust to invest them in lands, to be settled to the use of *R. Pole* for life, *sans waste*, remainder to *Ann* for life; remainder to all the children of the marriage, in such shares, &c. as *R. Pole* should appoint by deed or will; and in default thereof, as *Ann* surviving him should appoint; and for want of appointment, then to all such children and their heirs equally as tenants in common, if more than one. The

(q) 3 Atk. 419; 1 Ves. sen. 1.

(s) 6 Ves. 309.

(r) 1 Bro.C.C.129, *supra*, p. 1036.

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sum of 950*l.*, part of 1,071*l.* 8*s.* 7*d.*, one of the trust funds paid to the trustees, was laid out in the purchase of the manor of *Cotleigh*, which was conveyed to the uses of the settlement; and the remainder of that sum, after defraying the expenses, was received by *R. Pole*. *Ann Pole* died in 1758. The issue of the marriage were five children. Another part of the funds, to the amount of 1,000*l.*, was paid to the trustees on the 24th of *March* 1761, and was invested in their names in 1,025*l.* 12*s.* 10*d.* four *per cent.* consols. The sum of 1,385*l.* 14*s.* 3*d.*, all that was received upon the remaining trust funds, was paid in 1764, to *R. Pole*, and mixed with his own money. *R. Pole*, by his will, in *March* 1767, after several legacies, and giving his chambers in the *Temple* to his eldest son *Reginald*, gave *Mary Collins* an annuity of 6*l.* for life, with which he charged all his estate and effects, both real and personal. Then reciting, that his aunt *Hawkins* had promised to give him 2,000*l.*, of which sum she had then advanced him 1,000*l.*, in confidence that she would fulfil her promise, he gave his daughter *Ann* 2,000*l.*, and to his daughter *Sarah* 2,000*l.*, to be paid at twenty-one, or marriage with the consent of his executors and their aunts; if without consent, he revoked the legacy, and gave it among his other children equally. He gave his son *Charles* 2,000*l.* when twenty-one, and his son *Edward* 1,000*l.* when twenty-one; assigning the reason for the difference, that his aunt *Hawkins* had lately assured him that the 1,000*l.* remaining unpaid she had given to *Edward* by her will, and had also obliged him (the testator) to promise, in writing, to give the said 1,000*l.* if it came into his possession, to his said son. He directed the maintenance and education of his children, during minority, to be taken from the whole produce of his real and personal estate, so that the expenses did not exceed the growing profits. He also empowered his executors to sell his chambers in the *Temple*, and, if necessary, the manor of *Cotleigh*, and to apply the produce during his son *Reginald's* minority, as they should judge would be for his advantage; and he empowered them to lay out any part of his younger sons' fortunes during their minorities, for their benefit. He gave the residue of his estate and effects, both real and personal, after payment of debts and legacies, to his eldest son *Reginald*. At the bottom of the will was a memorandum, dated in *September* 1767, which stated that one of the sums of 1,000*l.* given to his daughter *Sarah*, was the 1,000*l.* formerly received of his aunt *Hawkins*, and at her request given to *Sarah*. The sum of 1,000*l.* mentioned in the will to have been promised by the

testator's aunt, was paid to him in his life. He died in *November* 1769, not having made any appointment. The bill was filed by *Edward Pole*, praying that he might be declared entitled to one-fifth part of the said estate and effects, and for an account of the rents and profits received by the defendant *Reginald*. *Reginald*, by his answer, stated, that at the testator's death 1,025*l.* 12*s.* 10*d.* four *per cent.* annuities were standing in the names of the trustees; but, except that fund and the manor of *Cotleigh*, they had no other part of the trust estate; the rest having been received by the testator, and mixed with his own property. That among the papers of the testator was found a schedule or estimate of the state of his personal property, down to the 4th of *September* 1769, in his own handwriting; and that the only part of his personal property not mentioned in that schedule, was the furniture of his house. That, besides the estates mentioned in his will, he had a tenement for the lives of himself and the plaintiff, producing something less than 29*l.* a year; and three farms were settled after the marriage upon him and his wife, and their issue, in the same manner as by the other settlement; and for want of such issue, or an appointment by the testator, to him and his heirs. The defendant then insisted, that the testator meant to dispose of all the trust property; as the manor of *Cotleigh* was specifically given by the will to the defendant, and as he had not assets to answer the legacies of 2,000*l.* each to his four younger children, without the application of his trust funds; and the legacies appeared calculated upon the property in the schedule, which comprised the stock and the sum of 1,385*l.* 14*s.* 3*d.* The schedule referred to by the answer begun thus: "This is not to be annexed to my will, being only intended for giving in one view to my executors the state of my securities." Then, after stating several securities, bonds, notes, &c., came this entry: "Stock in my trustees' names, *P. Rashleigh* and *J. Buller*, in four *per cent.* consols, cost 1,000*l.* at 97 $\frac{3}{4}$; one-eighth brokerage, 1,025*l.* 12*s.* 10*d.*" Afterwards, under the date 24th *June*, 1769, were the following entries: "Deduct 2,020*l.*; ditto O. S. S. annuities, 1,119*l.*; ditto *Llanrath*, 1,385*l.* 14*s.* 3*d.*" Other entries followed, and the last date was the 14th *September*, 1769. In giving judgment, Lord *Eldon*, C., observed: "The case is not precisely like any former one; it is not purely a case of either satisfaction or election. As to the manor of *Cotleigh*, it is a case of election. As to the sum mixed with the property of the testator, it is a case of satisfaction; and the question is, how the third subject, the stock actually vested in trustees, is to

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be treated; regard being had to the fact, that as to the two other subjects involved in the same trust, it is a case both of election and satisfaction. The right of the plaintiff rests upon the effect of the settlement; the transactions prior to the will, as far as they can be looked at in the way in which the Court can look at them, according to the rules of evidence, upon the will, and upon that paper, if the Court, under all the circumstances, is authorized to read it. The settlement, from the frame of it, would have left no doubt as to this sum, if, in fact, it had not been laid out in stock, but had been received by the father; for, upon the marriage, he would have become entitled to those funds *jure mariti*: but the form in which the trust for the children attaches upon it, is a covenant by the father, that he will do all acts, empowering the trustees to receive the money. If, therefore, he had received it, and it was in his hands at his death, it would be like *Hinchcliffe v. Hinchcliffe* (t). The money to be laid out in land when received, is in this Court to be considered as land; and the limitation in default of appointment is to the children, as tenants in common in fee; and they had a right to say, that wheresoever the money was found, it was to be laid out in land upon those trusts. The manor of *Cotleigh* having been conveyed to the uses of the settlement, the children are at law tenants in common in fee of that. The sum of 1,385*l.* 14*s.* 3*d.* having been received by him, and being in his hands bound by his covenant, he was debtor to his children for that sum, considered here as land, of which they were tenants in common in fee; and the 1,000*l.* paid by his permission to the trustees, and invested in stock, must also be considered in this Court as land, of which they were also tenants in common in fee. This was the state of affairs at the date of the will. He had it in his power, unquestionably, upon the principles of this Court, as applied to cases of election, to purchase either for himself or others the interests of his children in both these articles; by tendering to them by his will, a consideration which they should think more eligible for them than insisting upon their rights under the settlement in the land, and the money considered as land. As to the sum in his hands, for which he was debtor to his children, he might, as a debtor of any description, by his will satisfy that debt. As a parent, he must be taken to have intended to satisfy the claim of his children, to whom he was indebted, if the will contains such provisions as this Court

(t) *Supra*, p. 1077.

will hold a satisfaction of a debt from a parent to his children. In the manner in which these gifts are conceived, with respect to being more or less beneficially given, there are circumstances of difference between the provision by the settlement and that by the will: but it has long been settled, that slight circumstances will not alter the doctrine of satisfaction in this Court between parent and children. By his will he has taken upon himself to dispose, or thought he had power to dispose, of the manor of *Cotleigh*, and the money received by him as his estate; or at least he intended to make it pass under those words, by giving his children a consideration, raising a case of satisfaction. As to those two subjects, therefore, the plaintiff cannot succeed. The next question is one which, I own, has embarrassed me very much; whether, under all the circumstances, the plaintiff can succeed as to the stock. Upon the best judgment I can form upon this case, considered as a very particular case, standing almost by itself, a case upon the head both of election and satisfaction, I am of opinion, the plaintiff cannot succeed. The question that has been discussed is of very great importance, as to the admission of evidence, in order, as it is said, on the one hand, to explain the will, and on the other, not to explain the will, but to shew, either what ought to be the effect of two instruments upon each other, or what the testator meant with regard to the will as to this sum of stock; and whether he meant to consider it his own, or whether what he did by the will manifests his intention to purchase it for his own estate. Upon looking through the cases, of which there are a great many, to which it is not necessary to resort, the effect being extremely well collected in some of them, I think *Hinchcliffe v. Hinchcliffe* perfectly well decided. That case raised the ordinary question, whether the will, being the will of a parent, was meant to be a satisfaction of the debt, whether by covenant or otherwise, to his children; and therefore it is agreed, that such a will being upon the doctrine of this Court presumed a satisfaction, evidence was properly admissible upon two grounds; first, *to constitute the facts that he was debtor*: secondly, *either to meet or fortify the presumption, founded upon the doctrine of the Court*. There is no difficulty, therefore, in that case. The question is exactly the same as to the money received by the testator; if this schedule were made either before or after the will: with regard to that sum, his will in this Court affording a presumption of satisfaction, it would be competent to meet that presumption by evidence, and to admit evidence to confirm it; and as to that this schedule undoubtedly

Where testamentary provision a satisfaction of a portion.

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would be evidence. In this case, if the whole trust property was in the same state as the sum of 1,385*l.* 14*s.* 3*d.* remaining in the hands of the original debtor under the settlement, perhaps *Hinchcliffe v. Hinchcliffe* would be an authority in point for receiving the evidence: for that money in the hands of the testator would be expressly in the same situation as the money in the hands of the Bishop of *Peterborough*; a fund to come to the hands of the trustees by the effect of the covenant, and acts of the father. But the case is not so circumstanced; and it differs from all the cases in these respects, that as to the manor of *Cotleigh*, the legal estate was actually vested, by acts done in pursuance of the covenant, in the children. So the money laid out in stock, being actually vested in the trustees, by acts done in pursuance of the covenant, was vested in them for corresponding equitable estates. The question then is, whether, upon the circumstances, I can from this will and the schedule, if it be evidence, infer that the testator meant to purchase for his eldest son the manor of *Cotleigh*, the trust money in his own possession, and also the trust stock? Upon the head of satisfaction, he has clearly purchased for his eldest son the money in his possession: upon the head of election, he has proposed to his younger children the purchase of the manor of *Cotleigh* for his eldest son; and the question is, whether the will taken altogether, attending to these two circumstances, affords such a probability or presumption, that by the words, 'my estate and effects, both real and personal,' he meant to describe also this trust stock, that upon the will itself, or upon this paper, taken together with what arises out of the will, I can say, he did mean to purchase this for the benefit of his eldest son. Supposing, then, this paper admitted, the question is, does it speak the intention at the date of the will? Even the cases to which I have now alluded require that. Upon that I incline to think, that fairly taken it may be considered a declaration by the testator, as to what he meant at the date of the will. This paper seems to demonstrate, that he meant, as to his general personal estate, what the law would say he meant, not only what was his personal estate at the date of the will, but what should afterwards become so. This property was his to a certain extent. He was receiving the interest. Therefore, upon the paper and the title of it, it is reasonable evidence, that he would speak of it as his personal estate, in the same manner as he spoke of his securities as his. But if the case stood on this alone, I do not mean to say whether I should admit the evidence, or how I should decide it. I should have great

difficulty upon it unquestionably. But upon the whole of the will taken together, though the construction is not free from risk, there is very strong reason to say, the will itself manifests that he meant this property should pass as his personal estate. If that is to be stated as presumption, and not construction, then this evidence might be admitted, and would very much fortify the construction. It clearly may be admitted as to the money in his hands; but the question turns upon construction, as distinguished from presumption, as to the third subject. I have, therefore, so much doubt whether the evidence can be admitted (*u*), that, without saying whether it can or not, I decide this upon the will: that by the will, taking the whole together, the testator has manifested, that he meant to pass the whole of his property to his eldest son. Under these circumstances, the plaintiff must elect; and if he elects to take under the will, the bill must be dismissed, but without costs."

Where testamentary provision a satisfaction of a portion.

In *Bengough v. Walker* (*x*), by articles in 1763, previously to the marriage of *Isaac Elton* the younger with *Sarah Peach*, *Isaac Elton* and his father covenanted that the executors of *Isaac Elton* the younger should, within three months after his death, pay to the trustees the sum of 2,000*l.*, with interest from his death, upon trust that the trustees should place it out at interest, and pay the dividends or interest to *Sarah Elton* for life, and after her decease, upon trust for the younger children of the marriage, as *Isaac Elton* the younger should by deed or will appoint; and in default of appointment, upon trust, if there should be but one child of the marriage, in trust for such one child, if a son at twenty-one, if a daughter at twenty-one or marriage. The settlement contained a proviso, that any advancement by *Isaac Elton* the younger, in his lifetime, to any child, should be taken in full or part satisfaction, as the case might be, of the share of such child of the 2,000*l.*, unless *Isaac Elton* the younger should by will declare to the contrary. *Sarah Elton* died in 1763, leaving her husband, and one son, *Abraham*, their only issue; who attained twenty-one in 1784. The father did not during his life pay any part of the 2,000*l.*, nor make any advancement for his son, further than by the expense of maintenance and education. *Isaac Elton* died in 1790. By his will he devised to his son *Abraham* certain real estates; and bequeathed to him

(*u*) See *Druce v. Denison*, *infra*; his Lordship decided, after great reluctance, that such evidence was

admissible in this instance.

(*x*) 15 Ves. 507.

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all his capital share, interest and concern in certain powder works, to hold to him, his executors, &c. ; and he gave him such a sum of money, as being added to the capital of the said powder work concern, at the last settlement before the testator's decease, should make up in the whole the full sum of 10,000*l.*, he *Abraham Elton*, paying thereout to Mrs. *Prout* for life, 20*l.* a year. The testator also gave to his son *Abraham* a leasehold house, held for lives or years determinable on lives. *Abraham Elton* died, and a bill was filed by his executors for the payment of the sum of 2,000*l.*, covenanted to be paid by the articles. The question was, whether the covenant was satisfied? It was urged for the executors, that the provision by the will was not a satisfaction, since it was not *ejusdem generis*, that it depended entirely upon the computation of the share in the trade, whether *Abraham* could be entitled to any money at all, and that the share in the trade was not a clear interest, but encumbered with an annuity. But Sir *William Grant*, M. R., dismissed the bill. He observed, that, in the case of *Rickman v. Morgan* (*y*), Lord *Thurlow* held, that a residue should go in satisfaction of a portion, and thought it absurd that a residue worth 100,000*l.* should not be a satisfaction of a portion of 8,000*l.* merely because only a small portion of the residue was actual money. His Honor continued, "I am by no means clear, that, if this testator had confined himself to saying he gave so much of his residuary estate as should be of the value of 2,000*l.*, that would not have been a satisfaction of the portion of 2,000*l.* I have not found any case precluding such a determination. But that is not the whole ; for there is upon the face of the will a clear pecuniary bequest to some amount. The amount is, indeed, uncertain ; depending upon the value of the powder concern : but the testator, knowing the value of the share not to be 10,000*l.*, says, he means to give in money, all that the share shall fall short of such sum. If it does fall short to the amount of 7,000*l.*, he meant to give 7,000*l.* There is no reason, why I should not inquire the amount of the pecuniary legacy. It is not necessary, that it should appear upon the face of the will ; and more than in the case of a legacy to a son of such sum as the testator had advanced to another child upon marriage. Should I not in that instance inquire the amount? you cannot refer to extrinsic evidence to construe a will : but you may, to show, with reference to what the will was made. If I find, that the value of the share of the powder concern was 3,000*l.*, then

(*y*) 1 Bro. C. C. 63.

the value of the bequest is 7,000*l.*; and can I take the legatee not to have a satisfaction for 2,000*l.*;" and he further observed, that the child would have the portion clear, and in as beneficial a manner as by the articles; and that the portion was satisfied (a).

Where testamentary provision not a satisfaction of a portion.

The case of *Williams v. Duke of Bolton* (b), appears to have decided that the gift of a rent charge may be a satisfaction of a gross sum charged upon land.

With respect to the admission of evidence in regard to the subject of satisfaction, it may be collected from the cases of *Jeacock v. Falkener* (c), *Haines v. Mico* (d), *Hinchcliffe v. Hinchcliffe* (e), *Pole v. Lord Somers* (f), *Weall v. Rice* (g), *Kirk v. Eddowes* (h), and *Hall v. Hill* (i), that, as the question of satisfaction is a mere rule of *presumption*, it may, like all other presumptions, be repelled or confirmed by parol evidence.

SECT. II. The cases where the testamentary provision has not been considered a satisfaction of a portion, it being *contingent*, or given for a *different* purpose.

Although trifling circumstances of difference between provisions by settlement and will, as between parent and child, will not prevent the latter provisions from being a satisfaction of the former, yet, if the legacies be *contingent*, and the portions *absolute*, or if the legacies be given with a view to some other purpose, they will not in any of those instances, go in satisfaction of the portions.

Where testamentary provision not a satisfaction of a portion.

Thus in *Bellasis v. Uthwatt* (j), in 1713, upon the marriage of *Rupert Bellingsley* with *Mary C.*, he made a settlement of some Exchequer annuities for ninety-nine years, to the amount of 300*l.* a year, in trust for himself for life, remainder to his wife for life, remainder to his children in such manner as he should appoint, and if no children, to his executors, &c. By the marriage, there was only one child, named *Bridget*. *Bellingsley* was also

(a) See *Weall v. Rice*, 2 Russ. & M. 251, where the testamentary provision was a devise of real estate; also *Glengall, Earl of v. Barnard*, 1 Keen, 769.

(b) 1 Dick. 405, and 4 Dru. & W. 226, in note from Reg. Lib., and see per Sir E. Sugden, C.; *Ib.* p. 239.

(c) *Supra*, p. 1036.

(d) *Ib.* p. 1036.

(e) *Ib.* p. 1077.

(f) *Ib.* p. 1085.

(g) 2 Russ. & M. 251.

(h) 3 Hare, 509.

(i) 1 Dru. & W. 94, *et vide supra*, 397, &c.

(j) 1 Atk. 426.

Where testam-
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seised and possessed of a considerable real and personal estate, and in 1720, devised all his real and personal estate to his wife and her heirs, charged with the payment of 10,000*l.* as a portion for his daughter, *payable at eighteen*; and in case his wife should marry again, that the estate should be charged with the further sum of 5,000*l.* for his daughter. *Bellingsley* and *Mary* his wife died, leaving *Bridget* their only daughter between eleven and twelve years of age, who, in a few years after her mother's death, married *W. Bellasis*, by whom she had one daughter, and died about twenty. Upon a bill filed by the plaintiff, as administrator to his wife, and in her own right, and with his infant daughter against the sister of the testatrix for an account of the real and personal estate of *Mary*, the question was, whether the provisions by the will, were in satisfaction of the annuities in the settlement? and Lord *Hardwicke*, C., first declared, that *Bridget* took a vested interest in the annuities, though no appointment was made by the father: and upon the point whether the 10,000*l.* devised by the father to *Bridget*, should be taken to be in satisfaction of the annuities, expressed his opinion that it could not be taken in satisfaction, but that *Bridget* was entitled to both as a double portion: that when a bequest is taken to be by way of satisfaction for money before due, the thing given in satisfaction must be of the same nature, and attended with the same certainty as the thing in lieu of which it was given, and land was not to be taken in satisfaction for money, nor money for land. The legacy of 10,000*l.* was subject to a *contingency*, and not payable unless *Bridget* survived the age of eighteen years; and besides she might have lived till the annuities were run out, as several of the years were already gone; and as the 10,000*l.* legacy might never have become payable, it would be hard to say that a mere contingency should take away a portion absolutely vested, especially in the case of an only child.

In *Saville v. Saville* (*k*), by settlement in *February*, 1694, made upon the second marriage of *William* Lord *Eland*, eldest son of *George* Marquis of *Halifax*, with Lady *Mary Finch*, after the usual limitations, a term was created for five hundred years, charged upon all the manors and lands in *Nottinghamshire* and *Yorkshire*, comprised in the settlement, upon trust, that if there should be a failure of issue male between them, and if there should be one daughter or more, the trustees should, after the commencement of the term, raise by sale, &c., 20,000*l.*, if one

(*k*) 2 Atk. 458.

daughter only; but 25,000*l.* if two or more, equally to be divided, and to be paid to them at sixteen or marriage; and if any of them died before their portions became payable, the same were to survive, and be paid at the same time as the original portions; provided, that if lands or tenements of an estate of inheritance should *descend* to the daughters from Lord *Eland*, of as great value to be sold, as the portions thereby intended for them, then the term should cease, and be void for the person who should next be in reversion or remainder of the said manors, &c. The marriage took effect, and *George* Marquis of *Halifax*, by conveyance in *March*, 1794, reciting the settlement, and that the reversion and inheritance of the premises comprised in it were limited to him in fee, did, in consideration of his name and family, and to support the same, in case neither he nor his son Lord *Eland* should leave any issue male, settle the said estates upon Sir *George Saville*, for ninety-nine years, if he lived so long, *sans waste*, and to his first and other sons in tail male, with remainders over. *George* being seised in fee of several other manors and lands in other counties, and having the reversion in fee of divers manors, &c.. expectant upon the death of the then Marchioness Dowager of *Halifax*, and likewise the reversion and inheritance in fee of several fee farm rents expectant on the death of *Catherine* Queen Dowager, made his will in 1691, and gave his house at *Acton* in *Middlesex*, to his wife for life, remainder to Lord *Eland* in fee. The testator died without any other issue male than Lord *Eland*, who proved the will, and being seised under the will as above, by deeds in 1695, settled several manors, lands, &c., in the counties of *Northampton*, *Derby*, *York*, *Nottingham*, *Middlesex*, and *Surrey*, to the use of himself for life, remainder to the use of such person, and for such estate, as he by deed or will should appoint, and in default of appointment, then, after his death, to his first and other sons in tail male, remainder to his daughters in tail general, remainder to the use of Lady *Stanhope* in tail, with remainder to the right heirs of Marquis *George*. Lord *Eland*, then Marquis *William*, by a codicil to his will in *August*, 1700, devised all his said manors, &c., to his executors for five hundred years, to raise, if he had no son, 5,000*l.* a piece additional portions for his daughters, to be paid at sixteen or marriage, and subject to the term, he gave the manors, &c., to his first and other sons in tail male, remainder to such uses and for such estates as were thereof declared by the deeds of 1695. Marquis *William* died without issue male, leaving daughters by his first wife, Lady *Ann Bruce*, and by his second, Lady *Essex*, Lady *Dorothy* and Lady

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Mary Saville, two born in his life, and the other after his death. The defendant Sir *George Saville*, entered upon the lands in *Nottinghamshire* and *Yorkshire*, conveyed to him by the deed of *March*, 1694, subject to the charges aforesaid, and it was decided by Lord *Macclesfield*, C., assisted by Lord Chief Justice *Pratt*, Sir *Joseph Jekyll*, M.R., Lord Chief Justice *King*, and Mr. Justice *Tracy*; first, that a valuation ought to be put upon the lands descended to the plaintiffs, the daughters of Marquis *William*, (as an equivalent for the 25,000*l.*) as the same were worth to be sold at the time of such descent, and from that time the trust term of five hundred years ought to cease: but if the value of the descended lands were not equal to the portions intended to be raised, then the term to continue in trust to raise the residue. Secondly, that whatever lands the daughters took by the will of their father, they took not by descent, but as purchasers, and such lands could be no part of the equivalent. Thirdly, that the estate tail descended to the three daughters and Lady *Bruce*, as heirs of the body of their father, remainder to Lady *Stanhope*, either in possession or expectant on the death of the late Queen Dowager, and the Lady Marchioness Dowager, was no satisfaction of all or any part of the portions; but, if any estate in fee simple descended to them from their father, in possession, or reversion expectant on any term for years, that ought to go towards their satisfaction.

In *Hanbury v. Hanbury* (1), by settlement in *October*, 1734, lands were settled, in events which happened, upon *Capel Hanbury* for life, remainder to his first and other sons in tail male, with remainders over. There was a power for *Capel*, when in possession, to charge the premises with 2,000*l.* for younger daughters, with maintenances not exceeding the interest. By another settlement in *September*, 1743, previous to *Capel's* marriage with *Jane Tracy*, he charged the lands with 2,000*l.* The marriage took effect, and *Capel* died in *December*, 1765, leaving his widow, an only son, and the plaintiffs his only daughters and younger children, upon which event they became entitled to the 2,000*l.* *Capel*, by will in *March*, 1750, prior to the birth of the plaintiff *Frances*, gave to *Henrietta* 4,000*l.* to be paid out of a particular mortgage, and after the birth of *Frances*, and before her baptism, viz. in *April*, 1759, he made a codicil to his will, by which he left *Frances* (by the name of his new-born daughter, who was to be called *Frances*), 5,000*l.* charged on lands therein

(1) 2 Bro. C. C. 352, 375.

mentioned. *Capel Hanbury* afterwards, in *May*, 1759, gave *Frances* 5,000*l.* more, in the whole 10,000*l.* charged upon his personal estate. He afterwards made a third codicil, written upon the same paper in which his will and two former codicils were written, and attested by two witnesses, and thereby revoked all that part of his will relative to *Henrietta*, and gave 20,000*l.* to be equally divided between the plaintiffs, to be paid down, or sufficient security given for the payment thereof, *within thirty days of either of them being married*, provided the person whom she should marry should settle upon her a jointure of 500*l.* a year, otherwise she should have 5,000*l.* only, and the remaining 15,000*l.* should be paid to the unmarried sister, who was not entitled to more than 5,000*l.* unless she should marry with the consent of her brother, if living; but if he should be dead, the testator left the whole of his real and personal estate to *Henrietta*, she paying to *Frances* 12,000*l.* upon her marriage day. *Capel Hanbury* not having appointed any executor, administration was granted with the will and codicils annexed, to his widow and his son *John*. A bill was filed in 1766 by *Henrietta*, against *John* and *Jane*, the widow, and *Frances*, for the legacy, and a decree was made, with the usual reference to the Master, to take an account, &c., but no direction was given as to the legacies. In 1768, the personal estate being so circumstanced that it could not be determined whether it would be sufficient to pay the debts and legacies, a bond was given by *John Hanbury*, the brother of the plaintiffs, to the late Baron *Tracy* and the defendant *Dagge*, in the penalty of 40,000*l.* reciting the will and codicils of *Capel Hanbury*, and the doubt of the sufficiency of his personal estate to pay the debts and legacies, but nevertheless that *John Hanbury* was desirous to effectuate his father's intention, by securing the sum of 20,000*l.* for the portions of his sisters, with suitable allowances for maintenances till they should attain twenty-one, or be married; the condition of the bond was, therefore, that *John* should pay 5,000*l.* a piece to the plaintiffs, upon their attaining twenty-one or days of marriage, with maintenances as therein secured, and should secure 5,000*l.* more to each of the plaintiffs, to be paid on the death of *Jane Hanbury*, their mother, if they should then have attained twenty-one, or should be married; otherwise at their ages or marriage as aforesaid, with interest at 4*l.* per cent. from the death of the mother; and it was declared that the bond should only be a security for the portions and maintenances, in case, at the final hearing of the cause, it should appear that there were not sufficient assets of *Capel*

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Hanbury to pay the 20,000*l.* given to the plaintiffs, and if it should appear that the personal estate of *Capel* was sufficient, the bond should be void. No further proceedings were had in the cause; but *John* stated an account of the personal estate of *Capel*, which had come to his hands, by which it appeared the personal estate was not sufficient to pay the debts and legacies. *John Hanbury* died in *April*, 1784, intestate, leaving the defendant *Jane Hanbury*, his widow, and the defendant *John Capel*, his eldest son and heir-at-law. The defendant *Jane* obtained letters of administration of his personal estate. The plaintiff *Henrietta* attained twenty-one the 11th *February*, 1770, and *Frances* attained that age the 2nd of *April*, 1780, and thereby became entitled to 10,000*l.*; several sums had been paid by *John Hanbury*, and since his death, by *Jane*, his widow, for maintenance and interest on the bond. The present bill was filed by the plaintiffs in 1786, for payment of the 2,000*l.* under the settlement of *September*, 1743, with interest from the father's death, and for the 20,000*l.* given by the codicil, and secured by their brother's bond; but the defendants insisted that *John Hanbury's* giving the bond in trust for the plaintiffs, and thereby securing them a more certain provision than they were entitled to under the will and settlement, was intended by him as a satisfaction, and that the plaintiffs had accepted the same from their ages of twenty-one, and made no other demands. Lord *Thurlow*, however, decreed, that neither the gift by the codicil nor the bond, were a satisfaction of the 2,000*l.*; observing, that by the codicil the daughters took nothing except they married; that, in order to hold it a satisfaction, he must understand the testator to mean to give his daughters, what he was bound to do by nature, and at the same time, that he was to give them nothing unless they married; and with regard to the bond, his Lordship said, that upon considering all the cases, he could not distinguish the present from them, and therefore he did not think the bond a satisfaction for the other portions.

SECT. III. The cases wherein a testamentary provision has been considered an *advancement* in the lifetime of the parent.

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We shall next present the reader with a class of cases, wherein the *testamentary* provision has been considered an *advancement in the lifetime* of the parent, in full or part satisfaction of the portion provided by settlement, which settlement contains a

declaration that advancement by the parent, in his lifetime, shall be considered in part or full satisfaction of the portion, *unless the contrary is expressly declared by some writing*: and it is immaterial, whether the testamentary benefit is of a legacy, or a residue.

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The principle being admitted that a testamentary provision is an advancement in the parent's lifetime, and which, it is presumed, the cases adduced in the present section fully establish, the next consideration is, the intention of the parties to the settlement, and that of the testator. The principle seems to have been acted upon in *Rickman v. Morgan* (m). In that case, by the marriage settlement of *John Butler*, a provision was made of 8,000*l.* a piece for his younger children, with a proviso declaring, "that if the father should, in his lifetime, or at the time of his death, give to any of his daughters, or younger sons, so entitled to portions or provisions under that trust, money or lands, for an advancement in marriage or otherwise, the value thereof should be deducted from the portion, *unless he should by writing declare to the contrary.*" *John Butler*, the father, by his will in 1766, gave a sum of 4,000*l.* in the funds, to his wife for life, and after her decease to his second son *John Butler*, junior, and also gave to *John* the residue of his personal estate, and made him executor. The question in the cause was, whether the legacy of 4,000*l.* given to *John* the son, subject to the life of his mother, and the residue, amounting to more than 8,000*l.*, should go in satisfaction of the 8,000*l.* provided for him as a younger son under the settlement. Lord *Thurlow* determined that it should; in the course of his judgment, observing, "This proviso seems to get rid of the cases upon the head of *satisfaction*, which have been decided upon the head of intention, as when a man has contracted to pay to *A.* at his death, a certain sum, and he does an act in discharge of that obligation, many questions have arisen, how far it was his intention to exercise his benevolence, or to apply himself in discharge of the contract. In support of the argument upon the circumstances of intention, the burthen of proof must lie upon those who would discharge themselves of the obligation, because such a gift is a bounty, *prima facie*, and cannot be turned round but by strong circumstances of a contrary intention, as in the case of a bond debt. I also lay out of the question cases of *performance*; they

(m) 1 Bro. C. C. 63, continued 2 Bro. C. C. 393; *Fazakerley v. Gillibrand*, 6 Sim. 591.

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ultimately turn upon the head intention: for if a man has done that, which is apparently tantamount to what he covenanted to do, yet, if he did not intend it as equivalent, or in performance, it would be idle for the Court to say, that he meant it as such; therefore, I have been at a great loss, to make a broad and useful distinction between *satisfaction* and *performance*, because, of the intention of the testator, it is consequently a performance, and if that is the very thing contracted to be done, it is a proof that the party under the obligation has done it in conformity to such obligation, and is then to be deemed a performance, because there is no doubt of it. As to *Barrett v. Beckford*, *Lee v. D'Aranda*, and *Blandy v. Whitmore*, whether these determinations are well founded, or not, *it would be idle for a Court to decide, without considering the intention of the party, or to say that these cases exclude the idea of his intention*; for the general rule of construction was, that the act was done in performance of the obligation, by which the party had bound himself. Either in *Blandy v. Whitmore*, or some of those cases, much stress has been laid upon the word *leave*, and the question was, whether the circumstances of the party suffering his estate to fall into the hands to which the law would give it did not come under the proper use of the word *leave*, the very thing the party had contracted to do; and the same sort of argument was much used in *Lee v. D'Aranda*, and it is sufficient to warrant me in saying, how material an ingredient in such a case as this, is the intention of the testator, which is not to be denied, unless something appears in the will to show he meant otherwise; *it must therefore proceed entirely upon the intention*. The clauses in the deed exclude both species of argument, and leave the conclusion, to be drawn from them, to rest upon the intention, without any express declaration of the testator, and the whole of the argument goes to this point, whether the party who has been benefited to a greater extent under the will than he would have been under the deed, by reason of the charge upon the real estate, should still keep up that charge upon the estate, contrary to the intention of the party. Had a legacy been given to the amount of 8,000*l.*, but not payable till twelve months afterwards, it would still have been a satisfaction, because a specific sum. It is said- the thing here to be given ought to have been a sum of money; and consequently, no other thing, however valuable, as a chose in action, or anything to be reduced into possession, could be a satisfaction. It would be too idle to contend, that a bond not payable at the actual moment of the testator's death, or stock to the amount of

50,000*l.* or any other large sum, should not be a satisfaction, because it could not be immediately transferred into the hands of the son. But, supposing there was a residue of 100,000*l.* and 500*l.* cash, and the rest in various other articles outstanding, then the question would be, whether, in point of fact, he had advanced his son, without his taking the 8,000*l.* It would be ridiculous to insist, that residue would not have been a satisfaction for the 8,000*l.*; it is strange to say, that the gift of the whole residue, being uncertain, shall not be a satisfaction, when a moiety of that very residue, given as a legacy, will. Shall that half be deemed a performance of the covenant, but a gift of the whole shall not? A point has been made, that if this residue is a satisfaction, suppose the infant was bound to take it as an advancement, he might wait many years for it; that various difficulties might occur, before it would be ascertained: but that dilemma never can arise; for, on the contrary, upon an estate incumbered in the manner this is by the settlement, the first fund would be 8,000*l.* charged upon the estate, and that he must have at all events, but what then? Supposing the personal fund is afterwards got in, and the infant insists upon having that fund, then the question would be, whether he is to retain both funds, or give up the charge upon the estate so as to discharge its incumbrances, whenever the personal fund shall be found to be to that extent, it is not material to consider what would be the effect of that residue, for I consider it as a contingent legacy, given upon the event of the mother's marrying in the son's lifetime, as an executory devise in favour of the younger children, and consequently in the same view as a discharge of the 8,000*l.* The same reasoning applies to the gift being available, but not actually paid in; and, according to my construction of the clause, the Master's report has determined this point; the result of his inquiry being, that the sum of money acquired by the residuary bequest is greater than the sum of 8,000*l.*"

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In *Twisden v. Twisden* (n), the question was, whether a share to which a child became entitled upon the *intestacy* of the parent, should be considered an advancement within the terms of the proviso in the settlement? and Lord *Eldon* decided that it should not. In that case the rule was discussed, and the facts were shortly these: Sir *Roger Twisden* by his will, in 1772, in pursuance of a power contained in a deed, appointed and devised real estates in *Kent* to his eldest son *Roger* for life, with re-

Seeds of a distributive share on intestacy.

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mainder to trustees to preserve, with remainder to trustees for a term of three hundred years, for raising portions for younger children living at the decease of *Roger* the son, who, if sons, should attain twenty-one, or if daughters, that age or marriage; if only one younger child 4,000*L*. if two 6,000*L*.; with a proviso, that if there should be no issue male of his son *Roger*, who should become entitled under the limitation, and only one daughter, then 10,000*L*. to be vested in her at twenty-one, or marriage, and paid accordingly, if after the decease of *Roger* the son; with power to apply part of the rents and profits for maintenance, &c. Among other things, it was provided, that in case all the daughters and younger sons of *Roger* the son should be by him in his lifetime *advanced and preferred* with portions, as good or greater than the portions thereby for them intended, or if the portions to be *given* to or with them or any of them should fall short of the portions thereby for them provided, so much money should be raised as would make up such portions so given to the full value of the portions thereby for them intended. *Roger* the grandfather died, and afterwards *Roger* the son, leaving his wife *enciente* with *Rebecca* the plaintiff in the cause, who attained twenty-one, and filed her bill, praying, among other things, she might be entitled to the sum of 10,000*L*. The question was, whether the two-third parts of the surplus of the personal estate of the plaintiff's father, to which she became entitled by her father's intestacy, and which amounted to more than 10,000*L*. should be taken as a portion advanced within the meaning of the will of Sir *Roger*. Lord *Eldon* decided that it should not; observing, "if the law is, that what is to be taken under the will is not an advancement in the life of the party, it is very difficult to say, that what is taken under an intestacy shall be an advancement; and though it is true, the will must be made in the life, it is equally true, nothing is advanced or given to the party to take till after the death. If therefore the words "advanced and preferred in his lifetime," were the only words in this will, the construction, that even a testamentary disposition, much less what is taken under an intestacy, would adeem this portion, would be a stronger construction than the Court is authorized to put upon the words:" and in concluding, his Lordship said, "my judgment therefore is, that this personal estate, taken by the plaintiff, does not adeem the portion; which is therefore to be raised. But if you choose to speak to it again, as it is a question of great importance, I will hear it with the assistance of the Master of the Rolls and Lord

Abanley." The case was not re-argued, and the decree was for raising the portions.

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From the passages quoted, and others in his judgment, Lord *Eldon* has been thought by Sir *William Grant*, in the case of *Onslow v. Michell* (o), to have considered the principle in question as very doubtful; but it is difficult to reconcile this opinion with the unequivocal declaration of his Lordship in the case of *Leake v. Leake* (p), which so shortly followed the determination of *Twisden v. Twisden*, that the question had been *repeatedly decided*. It is presumed, that his Lordship argued hypothetically, upon the supposition of the principle being doubtful; and that if so, *à fortiori*, the share upon an intestacy could not be considered an advancement in the parent's lifetime; and his Lordship also seems to have thought that, even if the case of *Twisden v. Twisden* had been a case of *testamentary bequest*, instead of intestacy, it was very doubtful, whether the principle was applicable to the peculiar circumstances of the case.

In the case of *Leake v. Leake*, in the settlement made upon the marriage of *Stephen Martin Leake* and *Ann Powell*, in 1734, a term of eight hundred years was limited, upon the decease of the survivor, to trustees, the trusts of which were for the raising of portions for the younger children; if two or more children, 2,000*l.* to be equally divided amongst them, if sons, at twenty-one, and if daughters, at that age or marriage. The settlement contained a proviso, that if any of such younger children *should have been preferred in marriage* in the lifetime of the said *Stephen Martin Leake*, or he should have *bestowed or given* any portion or portions with him, her or them upon such his, her or *their marriage or otherwise provided* for him, her or them, such portion or other provisions should be taken and accounted for in full or in part of the provision thereby intended; "*unless the said Stephen Martin Leake should declare the contrary thereof, by any writing under his hand and seal, to be executed in the presence of two or more credible witnesses, or by his last will and testament, in like manner to be executed and attested.*" *Stephen Martin Leake*, by will in 1786, expressed his desire that the settlement should "*be punctually complied with,*" and gave all the residue of his real and personal estates to be sold, and the produce to be equally divided among all his children, except his eldest son; "so as the same, with what they might have received respectively in his lifetime, as a portion and for placing them out in the world, being brought to account, might

(o) 18 Ves. 494.

(p) 10 Ves. 477.

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make them all equal." By a codicil not attested, and which was not therefore, with reference to the settlement, a declaration affecting the charge for portions, the testator mentions the proviso before stated, and, in order to prevent disputes respecting the sums he had advanced to his children, enumerates the different advances he had made, and then declares that it is his will, that those sums, and no more, should be deducted from their respective shares; nevertheless, to account for such further sums as they should receive in his lifetime after the date thereof. When the testator died in 1773, he left a widow and eight younger children, among whom the widow, as executrix, divided the residue of the personal estate in equal shares, each child accounting for the sums advanced, as mentioned in the codicil. The residue so divided amounted to 740*l.* each. Upon the death of the eldest son, the second son, *John Martin Leake*, became tenant in tail under the settlement, and suffered a recovery to the use of himself in fee; the mother died in 1802, at which time there were six children surviving. The five younger children filed their bill against their brother *John Martin Leake*, claiming the 2,000*l.* under the settlement: and the question was, whether the provisions made for them by the advancements of the father in his life and by his will, were a satisfaction of the portions by the settlement? It was, among other things, contended for the younger children, that no advances, except on marriage, were within the meaning of the proviso. Lord *Eldon* decided that, though not strictly the grammatical construction of the words, "or otherwise," yet that the larger construction of those words, as applicable to provision made otherwise than on marriage, was the most consonant with the general view and intent of such provisions in settlements. So that the advances made to the children in the lifetime of the parent, though not on marriage, were within the proviso. With respect to the question of the provision by the will as to the real and personal estate being a satisfaction of the children's claim, his Lordship observed, "It is truly said, that a provision by will is to be considered as an advancement in the lifetime of the party. *That has been repeatedly decided*; and is not to be disturbed." But his Lordship declared, that upon the whole view of the case, his opinion was, that the testator had, though not in express words, yet manifested an intention, that the testamentary provision was *not* to go in satisfaction of the sum of 2,000*l.* secured by the settlement: and in concluding his judgment, his Lordship said, "my opinion, rather than judgment, upon this case is, that according to the real intention

and legal effect of all the instruments, money advanced by the father, as preferment in marriage, or on any other occasion, is an advancement within the proviso; that the devise and bequest of the real and personal estate is not in this case an advancement in the life of the father; and the substantial effect of all the three instruments is, that the 2,000*l.* and the produce of the real and personal estate, should ultimately be divided equally among all the younger children; and therefore a younger child, advanced in the life of the father, in the sense I have given, must allow that in the account."

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Sir *William Grant*, in the case next stated, observing upon the case of *Leake v. Leake*, and Lord *Eldon's dictum*, "that it had been repeatedly decided," a provision by will was to be considered an advancement in the lifetime of the party, says, "I confess, I have not been able to find any former case, in which that question has been distinctly decided; but the case itself (meaning *Leake v. Leake*) does involve in it such a decision, for the only ground, upon which the provisions, made by the will, were held not to be advancements within the terms of the proviso, was, that the will amounted to a declaration that they should not be so considered. In the absence of such a declaration, it seems clear that the determination would have been the other way."

The case, in which the above observation occurred, is *Onslow v. Michell* (q). There, by a deed in 1748, in pursuance of a power contained in the settlement, made in 1734, upon the marriage of *Matthew Michell* and *Frances Ashfordby*, certain real estates were charged with the portion of 3,000*l.* for the younger child or children of the marriage, to be paid to such child or children, if a son or sons at twenty-one, if a daughter or daughters, at that age or marriage, unless those events happened in the lifetime of their parents, or the survivor of them; and in that case, within three months after the decease of the survivor, with interest at 4*l.* per cent.: and it was declared, that if the said parents, or either of them should, in their or either of their lifetime, settle, give or advance, unto, for, or upon any child or children of the marriage, entitled to portions under the appointment, any sum or sums of money, lands, tenements, goods or chattels, for and towards his, her or their advancement, or preferment in marriage, or otherwise, the same should be accounted and taken in part, or whole, of the portions hereby provided; unless the said parents, or the survivor of them, should, by writing

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signify or declare the contrary. The settlement contained a covenant by *Matthew Michell* to lay out 10,000*l.* upon real estates, to be settled, subject to life estates to himself and wife, and to a trust term for 600 years, upon his first and other sons, in tail, &c. The trust of the term was, after the decease of the survivor of *M. Michell* and wife, to raise 3,000*l.* as an additional portion for the younger children. The issue of the marriage were *Matthew*, *Francis* (who died an infant, and unmarried, in his father's lifetime) and *Ann*. *Matthew*, the father, died in 1752; having by will bequeathed to *Ann*, 4,000*l.* to be paid at twenty-one. *Ann* attained twenty-one, and married Sir *Richard Onslow*; and 2,000*l.*, part of the legacy of 4,000*l.*, was vested in trustees upon the trusts of the marriage settlement. On the death of *Frances*, the widow, in 1810, the bill was filed against *Matthew Michell* the son, by Sir *Richard* and Lady *Onslow*, and their children, praying an execution of the trusts of the settlement of 1748, and that the defendant might be directed to raise the two sums of 3,000*l.* The answer stated, that *Frances* the widow, after her husband's decease, made some trifling advances to her daughter, and bequeathed her a legacy of 500*l.* submitting that these sums should be taken as advancements. The Master of the Rolls, after noticing *Twisden v. Twisden*, and *Leake v. Leake*, observed: "There is, however, less difficulty in this case than in that (meaning *Leake v. Leake*). It cannot be argued here, as it might have been there, that according to the strict letter of the settlement, the advancement was actually to take effect in the lifetime of the parent. Here the word *settle* occurs; and it would have been clearly sufficient to settle a sum of money, though the payment should not take place until after the death of the parent. As the portions were not payable until after the death of both parents, why should it be an objection to the sufficiency of the settlement, that the instrument, by which it was made, could not operate until the death of one of them? Suppose the father had made a settlement by deed, with a power of revocation, and had died without revoking, could it be said, that the child took nothing by settlement from the father? Suppose it even to stand upon the word "give;" can a daughter, who under the will took a large sum, long before any part of the portion became due, say, her father has *given* her nothing? If he has given her anything, the gift is made by his will, which was an act in his lifetime. Upon the authority of the case of *Leake v. Leake*, and what I conceive to be the fair sense of this settlement, the portion must be considered as satisfied *pro tanto* by the legacy of 4,000*l.*

My opinion upon the effect of the legacy makes it unnecessary to consider the question of election. The legacy from the mother is under just the same circumstances."

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In *Goolding v. Haverfield* (r), there was a provision of 10,000*l.* for the portions of younger children of the marriage of *Thomas Browne Calley* and *Elizabeth Rowles*, in 1778, secured by a term of 1000 years, subject to the appointment of *T. B. Calley*, to vest in sons at twenty-one, or in daughters at that age or marriage, in the usual manner. The settlement contained a proviso, that in case *T. B. Calley* should in his lifetime give or advance any sum or sums of money, lands, tenements goods or chattels for preferring or advancing any of the said children in the world, or for placing him or them in any business or employment, or for the benefit or advancement of any of the said younger children, in marriage, or otherwise, such sum or sums, &c. should be accounted a satisfaction, *pro tanto*, unless the settlor should declare the contrary, by some writing under his hand, attested by two or more witnesses. There were issue of the marriage an eldest son, *Thomas Calley*, and four younger children under age, living at the death of the father, who died without making any appointment of the portions under the power in the settlement. By his will, dated 1791, he devised real estates, subject to the payment of his debts and legacies, to the use of his eldest son in fee, he paying thereout 2,500*l.* to each of the testator's daughters, on attaining twenty-one, or marriage; the sum of 2,500*l.* to *J. J. Calley*, his younger son, and 1,500*l.* to *W. P. Calley*, his youngest son, at their respective ages of twenty-one. The testator bequeathed the residue of his personal estate to his wife, who bequeathed the residue of her personal estate to her three surviving children, the youngest child of the marriage being then dead. The portions under the settlement had been paid in the widow's lifetime: and the question was, whether the children surviving and the representatives of the one deceased were or were not entitled to receive the legacies bequeathed to them by their father's will, in addition to the portions provided for them by the settlement. The Lord Chief Baron decided that they should not; the will not (in his judgment) containing any thing, which amounted to a declaration that the provisions thereby made should not go in satisfaction of the portions (s).

(r) *M'Clelland's Exch. Rep.* p. 345. *ham*, 2 Sim. & Stu. 99; also *Fazakerley v. Gillibrand*, 6 Sim. 591.

(s) See *Noel v. Lord Walsing-*

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The case of *Papillon v. Papillon* (t), in many respects resembles the last. There the testator by his marriage settlement had conveyed estates to the use of himself for life, with remainder to trustees for a term of 1000 years, to raise 5,000*l.* for portions of the daughters and younger sons of the marriage, the portions to be vested at the usual times, but not to be raised until after the father's death: and it was provided that if the father should, in his lifetime or by his will, settle, give, devise or bequeath, to or upon any of his children entitled, or who might become entitled to portions under the trusts of the term, any sum or sums of money, lands, goods or chattels, for or towards his, her, or their advancement or preferment in marriage or otherwise, then such money, lands, goods or chattels should be accounted as part, if less, or, if as much or more, as and for the whole of the portion or portions thereby provided for him, her or them, *unless the father should, by writing under his hand, signify and declare to the contrary*: there were issue of the marriage three sons and eight daughters who attained twenty-one. The testator, having previously by deed poll substituted certain estates in *Kent* for the estates comprised in the term, by his will after reciting the trusts of the settlement, devised, among other property, the estates in *Kent*, subject to the 5,000*l.* charged thereon to trustees, in trust, by mortgage or sale, or out of the rents to raise money to pay such of his debts and legacies as his personal estate should fall short of paying; and in the next place to pay 2,000*l.* to each of his younger sons (naming them) when and as they should respectively attain the age of twenty-one years, with interest from the day of his decease, at 4*l. per cent. per annum*; and he declared that, after payment of the debts and legacies, and the sum of 2,000*l.* to each of his younger sons, the hereditaments and premises devised to his trustees, or such part thereof as should remain unsold, for any of the purposes aforesaid, (subject nevertheless to any mortgage or mortgages which should be made by the trustees in pursuance of the power thereinbefore given to them for that purpose) should go to certain uses therein referred to, being uses in favour of the testator's eldest son. The question was, whether the legacies given to the two younger sons by the will were to be taken in satisfaction of their shares of the 5,000*l.* Sir *L. Shadwell*, V. C., thought that *prima facie* the portions were discharged by payment of the legacies of 2,000*l.*, and it was incumbent on those who said they were not, to shew that the

(t) 11 Sim. 642.

testator had done something which was equivalent to declaring by a writing under his hand that they should not be discharged: and after commenting on the form of the will, his Honor expressed his opinion, that there was nothing in the will which was equivalent to a declaration that the legacies given to the plaintiffs (the younger sons) should not be a satisfaction of their shares of the 5,000*l*.

Where distributive share of personal estate or real estate descending, considered a satisfaction of the debt or provision under a settlement

SECT. IV. The cases where the distributive share of personal or a real estate of equal or greater value, belonging to the parent, devolves upon the child.

In the preceding sections the cases have been adduced wherein portions have or have not been *satisfied* by *testamentary* provision. In close connection with this subject (*u*) we shall, in the present section, adduce some cases wherein the devolution of a distributive share of personalty, or the descent of real estate, from the person under the obligation to make the provision, upon the individual for whom it was provided, has been decreed a *performance* of the obligation.

In the discussion of questions of this nature, two descriptions of cases have occurred; the one consists of cases called cases of *performance*; the other, of cases of *satisfaction*. The cases considered in the present section are instances of the former class, in which there has been a covenant by a husband to leave or pay to his wife a sum of money at his death, and he dies intestate; and his wife's distributive share of his personalty, under the statute, is equal to or more than the sum stipulated under the covenant. In that case he is held to have performed, through the operation of the law, what he had covenanted to do. The other case is, where the wife takes a benefit, to an equal or greater extent, under the husband's will, to which the same reasoning is not applicable. But, although the bequest is not a performance, still it may be inferred, that the testator intended it as a satisfaction of the covenant, so as to raise a case of election (*v*). *Satisfaction*, as Sir Thomas Plumer observes (*w*), supposes intention; it is something different from the subject of the contract, and substituted for it; and the question always arises,

(*u*) Upon the principle of these cases, see Lord Eldon's observations in *Garthshore v. Chalie*, 10 Ves. 15. *v. Lavender*, 1 M'Clel. & Y. 50.

(*v*) *Per Alexander*, C. B., *Adams* *v. Goldsmid*, 1 Swan. 219.

Distributive
share a satis-
faction of a
provision under
marriage set-
tlement.

was the thing intended as a substitute for the thing covenanted? a question entirely of intent; but with reference to *performance*, the question is, has that identical act which the party contracted to do been done? Mr. Cox, in his edition of *Peer Williams's Reports* has favoured the profession with a valuable note upon this subject.

We now proceed to the cases to be discussed in this section, which are cases of the former class, namely, of *performance*. For cases of satisfaction, the reader is referred to Chapter XVII.

The first case is *Blandy v. Widmore* (x). There *A.* by articles on his marriage with *B.* covenanted with the trustees, that his executors, within three months after his decease, should pay *B.* 620*l.* if she should survive him. *A.* died intestate, and without issue; upon which *B.* the wife, by the Statute of Distributions, became entitled to a moiety of the personal estate, which was much more than 620*l.*; and upon the question whether the distributive share should go in satisfaction of it, Lord Cooper, C., determined, that the covenant was to leave the widow 620*l.* and that the intestate had left her that sum, and upwards, which she, as administratrix, might take presently upon his death; and that it should be in satisfaction of the covenant.

Lee v. D'Aranda (y) is a similar case. There, *Charles Henry Lee*, by articles previous to his marriage with *Martha Cox*, covenanted that he would, in his lifetime, by will, or by some sufficient assurance, grant to *Martha* or *Elizabeth D'Aranda*, the mother, or her executors, &c., in trust for *Martha*, for her separate use, 1,000*l.* to be paid to *Martha* after his decease, if she should survive him; and in case he should not, by will or otherwise, assure to *Martha* the sum of 1,000*l.* his executors should, within six months after his decease, pay her that sum for her own use. *Charles Henry Lee* died intestate; and upon the question, whether the widow should have the 1,000*l.* and her distributive share also, Lord Hardwicke decreed, that she was not entitled to the 1,000*l.* as a debt due on the articles, and also to a distributive share, in case it should amount to or be more than 1,000*l.*

The next case is *Garthshore v. Chalie* (z), wherein *John Chalie* upon his marriage with *Susanna Clarmont*, covenanted in the marriage settlement, that in case he should die before her, leaving

(x) 1 P. Wms. 323, and the Editor's note; see also *Saville v. Saville*, *supra*, p. 1094.

(y) 3 Atk. 419.

(z) 10 Ves. 1.

one or more child or children, then his heirs, executors, &c., should, within six calendar months after his decease, convey, pay, assign, &c., unto and for the proper use and benefit of *Susanna Clarmont*, her heirs, &c., one full and clear moiety or half part of all such real and personal estate, as he, or any person in trust for him, should be seised or possessed of at the time of his decease. Mr. *Chalie* died intestate; his widow insisted upon her claims under the settlement, and also to one-third of the residue under the statute. Lord *Eldon*, after an elaborate discussion of the cases, and acknowledging the authority of *Blandy v. Widmore*, and *Lee v. D'Aranda*, decided that the widow was only entitled to one moiety of the clear residue of the personal estate. His Lordship also took a distinction between a provision by will in bar of dower and thirds, which does not exclude the widow from her share under an intestacy, by the failure of a legacy (a), and the case of a provision by marriage articles; in the former case, the intention being to bar her of her thirds for the sake of persons under the will taking the residue; in the latter case, the true meaning of the agreement between husband and wife being, that the wife receiving that sum of money should consider herself as if she had survived her husband (b).

Distributive share a satisfaction of a portion under marriage settlement.

The above case was followed by *Goldsmid v. Goldsmid* (c), which was a case of *virtual intestacy*. By articles of agreement, previously to his marriage with the defendant *Martha Goldsmid*, *Abraham Goldsmid* covenanted, that in case he should die in her lifetime, his executors, &c., should, within three calendar months next after his decease, pay to *Martha Goldsmid*, her executors, &c. the sum of 3,000*l.* *Abraham Goldsmid* died, leaving his wife surviving, having by his will given all his property to his executors, in trust, after payment of his debts, at the expiration of three years from his decease, to divide it in such ways, shares and proportions, as to them should appear right. Two of the executors died in the testator's lifetime; one renounced, and the other alone proved the will, but died without ever having exercised the discretionary trust. Administration was granted to the widow. The bill filed by the children prayed a declaration, that the personal estate ought to be distributed in a course of

(a) *Pickering v. Stamford*, 2 Ves. jun. 272. *v. Smith*, 4 Mad. 325, *supra*, 1030; *Fourdrin v. Gowdey*, 3 Myl. & K.

(b) *Davila v. Davila*, 2 Vern. 723. 410.

(c) 1 Swan. 211; see also *Wathen*

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tlement.

administration, as if *Abraham Goldsmid* had died intestate, and that the widow, the defendant, was not entitled to the sum of 3,000*l.* under the articles, as a debt out of the testator's personal estate, and also to a distributive share of his personal estate, in case it should amount to more than 3,000*l.* Sir *Thomas Plumer*, M. R., decided, that the personal estate of *Abraham Goldsmid* should be distributed as if he had died intestate; and that the defendant admitting that her distributive share was larger than the sum of 3,000*l.* she should take her distributive share of the personal estate; but that the same was to be in satisfaction of the covenant in the marriage articles.

But in *Colleton v. Garth* (*d*), Sir *L. Shadwell*, V. C., determined that a rent charge expressed to be for a jointure, and in lieu of dower and "thirds at common law," did not bar the jointress of her distributive share in her husband's undisposed of personal estate. The case is very shortly reported, and the clause in the settlement excluding dower is not fully reported; but his Honor is reported to have said that it was *clear* the rent charge was intended to be in lieu only of any claim which the wife might have upon her husband's "lands." If there were no other words excluding dower than those reported, they are certainly much less comprehensive than those in *Davila v. Davila* (*e*), where the provision in the marriage articles was to be in full of dower, thirds, custom of London, *or otherwise out of his real or personal estate*, and the Lord Chancellor held the wife excluded from any share by the Statute of Distributions; "dower and thirds at common law," cannot be construed to include a distributive share under that statute.

Where real
estate descend-
ing, a satisfac-
tion of a por-
tion.

We may here notice the case of *Wilcocks v. Wilcocks* (*f*), which is an instance of real estate descending from the parent to the child in satisfaction of a covenant to provide a portion. There the plaintiff's father, upon his marriage, covenanted to purchase lands of the annual value of 200*l.* and settle the same on himself for life, on his wife for her jointure, and on his first and other sons in tail male, remainder to daughters. The father, having in his lifetime purchased lands of the annual value of 200*l.* died intestate, without having made any settlement of the lands purchased, but permitted them to descend upon the plaintiff, his eldest son. Upon the bill by the son to have real estates of the annual value of 200*l.* purchased out of the personal estate of his

(*d*) 6 Sim. 19.

(*e*) *Ubi supra*.

(*f*) 2 Vern. 558.

father, and settled according to the articles, Lord Keeper *Cowper* decreed the lands descended to be a satisfaction (*f*).

Distributive share a satisfaction of a provision under marriage settlement.

In addition to the preceding cases, the reader is referred to the cases of *Jesson v. Jesson* (*g*), and *Thomas v. Kemneys* (*h*), which are not within the scope of the present Treatise, but nearly connected with the subject of the present chapter, and are instances of the satisfaction of portions, secured by settlement, by subsequent provisions *by deed* in the parent's lifetime.

CHAPTER XIX.

Of Testamentary Dispositions to charitable and superstitious Uses.

SECT. I. What are *charitable* uses.

SECT. II. Of *superstitious* uses.

- 1.—*What are such; and how bequests to superstitious uses within the Statute of Edward the Sixth are applicable.*
- 2.—*How applicable, when not within that statute.*
- 3.—*When the purposes of the bequest are only in part superstitious.*

SECT. III. Of the restrictions imposed upon charitable bequests by the statute 9 Geo. 2, c. 36, and what charitable dispositions within its meaning.

- 1.—*Bequests of money charged on real estate.*
- 2.—*of money produced by sale of real estate.*
- 3.—*The vendor's lien for his purchase money.*
- 4.—*Bequests of terms of years.*
- 5.—*Of money due on mortgage, and estates in mortgage, of which mortgagee is in possession.*

(*f*) See also the case of *Lechmere v. Carlisle*, 3 P. Wms. 211; *Souden v. Souden*, 1 Bro. C. C. 582; 10 Ves. 10; *Tubbs v. Broadwood*, 2 Russ. & M. 487. (g) 2 Vern. 255. (h) Ib. 348.

- 6.—*Of money to exonerate land in mortmain.*
- 7.————— *on turnpike tolls.*
- 8.—*Canal shares.*
- 9.—*Of money secured on poor rates and county rates.*
- 10.—*Judgment debts.*
- 11.—*Profits of mooring chains in the river Thames.*
- 12.—*Of bequests in the first instance to particular objects, but attended with an ultimate charitable disposition within the statute.*
 - 1.—*Where the particular and general disposition not inseparably blended.*
 - 2.—*Where they are inseparably blended.*

SECT. IV. *Of testamentary Dispositions not within the Statute of 9 Geo. 2, c. 36.*

- 1.—*Where the direction to invest the fund in real estate is not imperative upon the trustees, but only discretionary.*
- 2.—*Devise of real estate or of money to be laid out in real estate for Queen Anne's bounty.*
- 3.—*Devises and bequests for promoting the building of churches, &c.*
- 4.—*Devises by freemen according to the custom of London.*
- 5.————— *for the benefit of the two Universities, &c.*
- 6.————— *of real and personal estate in Scotland.*
- 7.————— *of real estate in Ireland.*
- 8.————— *of real estate in the West Indies.*
- 9.————— *of money to be applied in melioration of lands in mortmain, and herein of instances not considered cases of melioration.*
- 10.————— *Produce of real estate to be laid out in erecting a monument.*

SECT. V. *Construction of charitable bequest, and administration of the fund.*

- 1.—*Where bequest is to charity generally, and there are neither trustees, nor objects named, nor a power of selection; gift is supported, and nomination devolves upon the King. Semble, when charity named is void.*

2.—*Where trustees or objects are named; or a power of selection given to others, or reserved by the testator to himself; gift supported, but administration of the fund devolves upon the Court of Chancery: and herein.* What are charitable uses.

1.—*Where no trustees nor objects named; but testator refers to a future appointment, which he fails to make.*

2.—*No trustee named: a descript class of objects referred to, but no individuals selected.*

3.—*Trustees named originally, but fail by matter, ex post facto; and a descript class of objects specified.*

4.—*Trustees named; no objects specified; but bequest to charity generally.*

5.—*Trustees named, and fund distributable at their discretion.*

6.—*Where the particular charity named, though not illegal, cannot take effect: but is executed cyprès; secùs, when the particular object is of the essence of the gift.*

7.—*Where charitable objects named, and the fund is more than sufficient.*

8.—*Where charity not within the jurisdiction of the Court of Chancery.*

SECT. VI. Of Bequests to charity void for uncertainty.

1.—*In regard to the amount intended to be given.*

2.—*In regard to the uncertain or indefinite purpose.*

SECT. I. Of Testamentary Dispositions to charitable and superstitious Uses.

WE proceed in the present section to inquire, what the law of *England* considers charitable uses; and we find that the preamble of the statute 43 Elizabeth, c. 4, expressly recognises (a) the following; namely, relief of aged, impotent and poor people, maintenance of sick and maimed soldiers and mariners, schools

(a) See Sir Edward Sugden's observations on this statute in the *Incorporated Society v. Richards*, 1 Dru. & W. 301, &c.

What are charitable uses.

of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, seabanks and highways; education and preferment of orphans; the relief, stock, or maintenance for houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen and persons decayed; relief or redemption of prisoners or captives; aid or ease of any poor inhabitants concerning payments of taxes.

Besides the above, purposes of a similar nature have been determined to be charitable uses. Thus, gifts for the diffusing the protestant tenets of the Christian religion, and promoting public worship according to those tenets, and for providing for its ministers: for instance, bequests for the advancement of the Christian religion among infidels (*b*); for the augmentation of poor vicarages (*c*); for the building of a church (*d*); for the paying off of an incumbrance on a licensed meeting-house (*e*); the repairing parsonage houses (*f*); the support of a preacher of a certain chapel (*g*); or of dissenting ministers in *England* (*h*); or for the vicar or curate of a certain place for preaching an annual sermon on a certain day (*i*); or to the singers sitting in the gallery of a certain church, to be paid on a certain day (*j*); to build an organ gallery in a church (*k*); to the clerk of a parish to keep the chimes of a church in good repair to play certain psalms (*l*); for the support of a burial ground (*m*).

So also, gifts for the promoting public works for the convenience or benefit of the public, or of the inhabitants of a particular place, are considered as charitable uses. Thus, for instance, a gift for the improvement of the city of *Bath* (*n*); a sum of money to be applied in forming works for supplying the inhabitants of *Chepstow* with spring water from *St. Arvan's*, or

(*b*) *Att. Gen. v. College of Wm. & Mary, in Virginia*, 1 Ves. jun. 245.

(*c*) *Widmore v. Woodroffe*, Amb. 636.

(*d*) *Att. Gen. v. Bishop of Oxford*, 1 Bro. C. C. 444, note; *Att. Gen. v. Ruper*, 2 P. Wms. 125.

(*e*) *Corbyn v. French*, 4 Ves. 418, 427.

(*f*) *Att. Gen. v. Bishop of Chester*, 1 Bro. C. C. 444.

(*g*) *Grieves v. Case*, 4 Bro. C. C. 67; *S. C.* 1 Ves. jun. 548, *infra*;

see also *Att. Gen. v. Pearson*, 3 Mer. 353, 409.

(*h*) *Waller v. Childs*, Amb. 524.

(*i*) *Soresby v. Hollins*, Highmore, 174; *Turner v. Ogden*, 1 Cox, 316.

(*j*) *Ib.*

(*k*) *Adnam v. Cole*, 6 Beav. 353.

(*l*) *Ib.*

(*m*) *Doe v. Pitcher*, 6 Taunt. 363.

(*n*) *Howse v. Chapman*, 4 Ves. 542; see also *Att. Gen. v. Heelis*, 2 Sim. & Stu. 67; *Mitford v. Reynolds*, 1 Phil. 185.

elsewhere (*o*); or for the support of a public botanical garden at *Stockwell* (*p*); or for the benefit of the British Museum (*q*). In like manner, gifts to promote the education or the relief of the poor (*r*); as a gift for establishing a school (*s*); notwithstanding the school be for the education of gentlemen's sons (*t*); for erecting a small school-house and a house for the master (*u*); also a bequest to the widows and children of seamen belonging to *Liverpool* (*v*); or for the establishment of a lifeboat (*w*); or to the churchwardens in aid of the poor's rate (*x*); or for the repair of a bridge (*y*); or to the poor inhabitants of the parish of *St. Leonard's Shoreditch* (*z*), which bequest was confined to those not receiving alms; also a gift for the support of hospitals (*a*).

What are charitable uses.

Other instances of valid dispositions to charity, will be found in the subsequent Sections of this Chapter, and particularly Section VI.

The following bequests have also been held valid dispositions to charity.

In *Nash v. Morley* (*aa*), a fund was given to executors to divide the interest half-yearly among "poor pious persons, male or female, old or infirm, as they see fit, not omitting large and sick families, if of good character."

In *Townsend v. Carus* (*b*), a legacy was given to trustees to divide or dispose thereof unto or for the benefit or advancement of such societies, subscriptions or purposes, having regard to the glory of God in the spiritual welfare of his creatures, as they shall in their discretion see fit.

So in *Attorney General v. Gladstone* (*c*), 15,000*l.* was given to *A. B.*, to be by him applied for the use of the Roman Catholic priests in and near London, at his absolute discretion.

In *Thompson v. Thompson* (*d*), the testator directed 50*l.* more or

(*o*) *Jones v. Williams*, Amb. 651.

(*p*) *Townley v. Bedwell*, 6 Ves. 194.

(*q*) *Trustees of Brit. Mus. v. White*, 2 Sim & Stu. 594.

(*r*) *Bristow v. Bristow*, 5 Beav. 292.

(*s*) *Att. Gen. v. Williams*, 4 Bro. C. C. 525; 5 Mad. 457.

(*t*) *Att. Gen. v. Lord Lonsdale*, 1 Sim. 109.

(*u*) *Att. Gen. v. Bowles*, 2 Ves. 547.

(*v*) *Powell v. Att. Gen.* 3 Mer. 48.

(*w*) *Howse v. Chapman*, *ubi sup.*

(*x*) *Doe v. Howells*, 2 Bar. & Ad. 744.

(*y*) *Att. Gen. v. Corp. of Shrewsbury*, 6 Beav. 220.

(*z*) *Att. Gen. v. Clarke*, Amb. 422; see also *Att. Gen. v. Ward*, 3 Ves. 328.

(*a*) *Masters v. Masters*, 1 P. Wms. 420.

(*aa*) 5 Beav. 177.

(*b*) 3 Hare, 257.

(*c*) 13 Sim. 7.

(*d*) 1 Col. 392.

What are charitable uses.

less, to be annually distributed in weekly allowance of bread among twelve poor old persons residing in the parish of *D.*, with some occasional donations to them and others. By a codicil the testator directed in reference to this bequest, that at least two sixpenny loaves be given every week to sixteen old persons; and that on the annual return of his birthday, each of these sixteen persons should receive a shilling loaf at the Mausoleum, which was to be erected to his memory.

In the same case (*e*), the testator directed a sum not exceeding 50*l.* a year, should be paid in quarterly payments to a literary man, preferably not more than forty years of age. By a codicil, he declared his object was, to give what little assistance he could to a worthy literary person who had not been very successful in his career, and so far as possible, to enable him to assist in extending the knowledge of those doctrines, in the various branches of literature, to which the testator had turned his attention and pen. Sir *Knight Bruce*, V. C., held, that provided the testator's writings contained nothing irreligious, illegal or immoral, this was a charitable bequest to which the law would give effect, and on the authority of *Cope v. Wilmot* (*f*), his Honor decided that the words "not exceeding," did not render it void for uncertainty.

With respect to bequests to poor relations, see Chapter II. Section 5.

So, it should seem, a bequest for the repair of a family vault is a charitable use: though as far as regards the testator's interment it is not (*g*).

In the *Attorney General v. The Haberdashers' Company* (*h*), the bequest was of a specific sum, and, subject to other payments out of the rents, of the residue of the rents of an estate to the Haberdashers' Company, for the increase of their stock of corn for the service of the market in London. By the evidence it appeared that the Haberdashers' Company, in common with other chartered companies, was by the usage of the City of London, bound to provide corn for the service of the markets in London, in case of scarcity. Lord *Brougham*, C., held, that the donation was for the benefit of the Company and its revenues, and was not subject to the jurisdiction of the Court as a charity.

(*e*) 1 Col. 395.

(*f*) *Ib.* 396, note.

(*g*) *Doe v. Pitcher*, 3 Maule & Selwyn, 410; *S. C.* 6 Taunt. 359; see also *Durour v. Motteux*, 1 Ves.

sen. 320; see also *Mellick v. The President and Guardians of the Asylum*, 1 Jac. 180, *infra*.

(*h*) 1 Myl. & K. 420.

In *Nightingale v. Goulburn* (i), a bequest "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country, *Great Britain*," was supported as a valid bequest. What are superstitious uses.

In the next place, we consider testamentary dispositions to superstitious uses.

SECT. II. Of Superstitious Uses.

All testamentary dispositions of real and personal estate to superstitious uses are illegal and void; it therefore becomes necessary to inquire what uses are by the law of *England* deemed superstitious.

1. There is not any statute making superstitious uses void generally. The statute of 1 *Edward* 6th, c. 14, relates only to superstitious use of a particular description, existing at the time it was passed (j). In that statute, all such uses as tend to maintain, promote, or countenance the corrupt fantasies of the popish church, are deemed superstitious; as, where a gift is made to procure the saying of masses for the soul of the devisor, or for the support of a chauntry priest (k). The Act alluded to recites, "that a great part of superstition and errors in religion hath been brought into the minds and estimation of men, by reason of the ignorance of their very true and perfect salvation, through the death of *Jesus Christ*, and by devising and phantasying vain opinions of purgatory and masses satisfactory to be done for them which be departed, the which doctrine and vain opinion by nothing more is maintained and upholden, than by the abuse of trentals, chauntries, and other provisions made for the continuance of the said blindness and ignorance." The Act, in its letter, is retrospective; but in its spirit and operation must be taken to extend prospectively to any dispositions that might thereafter be made to the superstitious uses therein specified, and to uses of a similar nature: so that, according to the first seven sections of the Act, all real and personal property whatsoever, which by virtue of any manner of assurance, conveyance, will, devise, or otherwise, shall have been, or shall be given, assigned, limited, or appointed to have continuance, for ever, or for a time only,

(i) 11 Jur. 383; see also *Mitford v. Reynolds*, 1 Phil. 185.

(k) See also *Gates v. Jones*, cited 2 Vern. 266, and 2 Myl. & K. 684;

(j) Per Sir William Grant, M. R.; 2 Beav. 151.
Cory v. Abbot, 7 Ves. 495.

Bequests to superstitious uses.

towards or about the finding, maintenance, or sustentation of any priest or priests of any anniversary or obit, lamp, light, or lights, or other like thing, the King shall take the same beneficially to him and his successors for ever (l).

6. How applicable when not comprised in statute Edw. 6.

2. It should seem from the cases next stated, that, although bequests made in favour of other superstitious uses than those comprised in the lastly mentioned Act, do not vest in the Crown beneficially, yet that the King shall have the appointment to such uses as he shall think proper.

Thus in the *King v. Lady Portington* (m), where a testatrix devised her lands to Lady Portington, in fee simple, without any trust declaring that she did it for the good of her soul. The devisee confessed that the estate did not belong to her, but was the property of God and his saints. Upon an information in the Exchequer for a discovery and application of the devise to an use truly charitable; it was held, 1st, that the Statute of Frauds did not bind the King; 2ndly, that the King, as head of the community, was obliged by the common law, and for that purpose entrusted and empowered, to see that nothing be done to the disherison of the Crown, or the propagation of a false religion, and to that end he was entitled to pray a discovery of a trust to a superstitious use; 3rdly, that this use being superstitious, was merely void, and for that reason the King could not have it; yet it was not so far void, as that it should result to the heir; therefore the King should order it to be applied to a proper use.

So also, in the case of *De Costa v. De Pas* (n), where *Elias De Pas*, a Jew, by his will established a fund of 1,200*l.*, to be appropriated in order to apply and dedicate the revenue of that sum towards establishing a *Jesuba*, or assembly for reading the law, and instructing the people in the *Jewish* religion (o). The question was, whether the legacy should go to the next of kin, or whether the Crown should have the disposal of it; and a distinction was taken by Lord *Hardwicke*, C., between a devise to a superstitious use made void by statute, and to a charity

(l) See *Duke* on Charitable Uses, 106; see also *Att. Gen. v. Vivian*, 1 Russ. 226, 237. .

(m) 1 Salk. 162.

(n) Amb. 228; see Lord *Eldon*'s comments upon this case in *Moggridge v. Thackwell*, *infra*.

(o) But although a gift to found

an institution for the purpose of teaching the Jewish religion is bad, a gift to perform charitable acts to Jews is good. *In re Bedford Charity*, 2 Swanst. 522; *Straus v. Goldsmid*, 8 Sim. 614; *Bennett v. Hayter*, 2 Beav. 81.

declared void by the Statute of Mortmain; in the latter case the subject of the devise should belong to the heir-at-law, or next of kin. But where the use was in itself a charity, but the mode in which it was to be disposed of was such as by the law of *England* could not take effect, as in the present case, in promoting a religion contrary to the established one; the Crown, by sign manual directed to the Attorney General, might order, in what charitable manner it should be disposed of. The reporter was informed that 1,000*l.* of the money was directed by sign manual to be given to the Foundling Hospital.

Requests to superstitious uses.

The distinction, taken by Lord *Hardwicke* in the last case, was recognised and acted upon by Sir *William Grant*, M. R., in the case of *Cory v. Abbot* (*p*). In that case *George Cory*, a Roman Catholic, by his will disposed of his residuary estate to this effect; "I give and bequeath, in trust, to my executors hereinafter named, and for the purpose hereinafter mentioned, all the residue of my personal estate not hereinbefore disposed of, of whatever nature, kind, or quality the same may be, also all interest arising therefrom, I give for the purpose of educating and bringing up poor children in the Roman Catholic faith, such as orphans, or those whose parents or friends were not able or willing, so to educate those children, to be chosen by my trustees hereinafter named, or such trustees as they shall afterwards appoint or cause to be appointed: nevertheless, I at all times allow a part of this residue to pay such sum or sums as may be requisite, for the legal security or execution of this or any other part of my will." The bill was filed by the brother and sister, and nieces of the testator, as next of kin, who were also legatees, claiming their legacies, and praying that the bequest of the residue might be declared illegal and void; and that it might be declared, the testator died intestate as to the residue, and the plaintiffs as next of kin to be entitled thereto, &c. His Honor observed, "The residue cannot be applied according to the will. The Roman Catholic religion has received a considerable degree of toleration by the 31 *Geo.* 3, c. 32, yet there is a provision in that Act, that all dispositions before considered unlawful, shall continue to be, and be deemed so. There is no doubt a disposition for the purpose of bringing up and educating children in the Roman Catholic religion, was unlawful before that time. The consequence of its being void, if authority were out of the question, would be an intestacy; that the gift being so void must be considered as no

Bequests to superstitious uses.

gift. But that is contradicted by authorities without number. According to them, whenever a testator is disposed to be charitable in his own way, and upon his own principles, we are not to content ourselves with disappointing his intention, if disapproved of by us, but we are to make him charitable in our way, and upon our principles. If once we discover in him any charitable intention, *that* is supposed to be so liberal as to take in objects, not only not within his intention, but wholly adverse to it. But in this case, can I, founding myself upon the expression of Lord *Hardwicke* in *De Costa v. De Pas* (*q*), say, this is so wholly void as not to be applicable to any other purpose? According to that statement, to entitle the heir or next of kin, it is requisite, not only that the devise is to a superstitious use, but to such as is made void by statute. In the *King v. Lady Portington* (*r*), one of the resolutions is, that the use being superstitious is merely void, and for that reason the King cannot have it: yet, however, it is not so far void, as that it shall result to the heir; and, therefore, the King shall order it to be applied to a proper use. Here the use is clearly charitable in its nature, *viz.*, for poor orphan children. What vitiates it is, that they are to be educated in the Roman Catholic religion. I must declare the bequest of the residue void, but that it must go to such use, as the King shall direct. The Attorney General therefore, will apply for a sign manual."

Bequests to promote the Roman Catholic Religion rendered valid by 2 & 3 Wm. 4, c. 115.

Since the publication of the former edition of this Work, a material alteration in the law, as established by the preceding case, has been effected by the statute 2 & 3 Wm. 4, c. 115, entitled, "An act for the better securing the charitable donations and bequests of his Majesty's Roman Catholic subjects in Great Britain." The following are the first and third sections of the act. 1. Whereas by an act passed in the first year of the reign of King William and Queen Mary, intituled "An act for exempting his Majesty's Protestant subjects dissenting from the Church of *England* from the penalties of certain laws;" and by certain subsequent statutes, the schools and places for religious worship, education, and charitable purposes of Protestant dissenters, are exempted from the operation of certain penal and disabling laws to which they were subject previously to the passing of the said recited act of the first year of the reign of King William and Queen Mary: and whereas by certain acts of the Parliament of *Scotland*, and particularly by an act passed in the year 1700, intituled "An act for

(*q*) The last case.

(*r*) *Supra*, p. 1120.

preventing the growth of Popery," various penalties and disabilities were imposed upon persons professing the Roman Catholic religion in *Scotland*: and whereas notwithstanding the provisions of various acts passed for the relief of his Majesty's Roman Catholic subjects from disabling laws, doubts have been entertained whether it be lawful for his Majesty's subjects, professing the Roman Catholic religion in *Scotland*, to acquire and hold in real estate the property necessary for religious worship, education, and charitable purposes. And whereas it is expedient to remove all doubts respecting the right of his Majesty's subjects professing the Roman Catholic religion in *England* and *Wales*, to acquire and hold property necessary for religious worship, education, and charitable purposes, *be it therefore enacted*, that from and after the passing of this act, his Majesty's subjects professing the Roman Catholic religion in respect of their schools, places for religious worship, education, and charitable purposes in *Great Britain*, and the property held therewith, and the persons employed in or about the same, shall in respect thereof be subject to the same laws as the Protestant dissenters are subject to in *England*, in respect to their schools and places for religious worship, education, and charitable purposes, and not further or otherwise.

Bequest to promote the Roman Catholic religion rendered valid by stat. 2 & 3 Wm. 4, c. 115.

3. Provided always and be it further enacted, that nothing in this act contained shall affect any suit actually pending or commenced (*s*), or any property now in litigation, discussion, or dispute in any of his Majesty's Courts of Law or Equity in *Great Britain*.

The case of *Bradshaw v. Tasker* (*t*) decided that this act was retrospective, and held that bequests to the trustees of certain Roman Catholic charity schools, given by a testator who died in *May*, 1823, were valid.

The preceding statute does not, however, give validity to bequests to uses deemed superstitious by the law of England, although not so considered according to the tenets of the Roman Catholic religion. That statute places bequests in favour of Roman Catholics upon the same footing as similar dispositions of property in favour of Protestant dissenters: so that a bequest of personalty to trustees to be appropriated in such a way as they may judge best calculated to promote the knowledge of the Roman Catholic religion among the poor and ignorant of the parishes of *A.* and *B.* is valid.

But not bequests to superstitious uses.

(*s*) *Att. Gen. v. Todd*, 1 Keen, 803.

(*t*) 2 Myl. & K. 221.

Bequests to superstitious uses.

Such in effect was the bequest of the residue in the recent case of *West v. Shuttleworth* (u). But bequests of sums of money to certain priests and chapels, to be paid as soon as possible, that the testatrix might have the benefit of their prayers and masses (explained in an accompanying testamentary paper to be for the repose of her soul and that of her deceased husband), were held to be superstitious and void (v).

In *Attorney General v. The Fishmongers' Company* (w), Lord Langdale, M. R., held on the authority of the earlier cases there cited, that establishments or foundations for securing prayers for the souls of the dead are superstitious, and within the statute of Edw. 6.

But in the case of *Read v. Hodgins* (x) November, 1844, the Master of the Rolls in *Ireland* decided, that such a bequest was good on the authority of the case of the *Comm. of Char. Don. v. Walsh* (y), in which Lord Manners, C., held a similar legacy valid.

In *Read v. Hodgins*, it was argued in support of the bequest that the cases of *West v. Shuttleworth*, and *Attorney General v. Fishmongers' Company*, had decided such bequests to be void, on the ground that they were superstitious, as within the stat. of 1 Edw. 6, c. 14, and not because they were contrary to the policy of the law (z), and that the statute of Edward did not apply to *Ireland*, and that no similar enactment had been adopted by the Legislature of that country; such, it is presumed, was the opinion of Lord Manners in the above case; but neither the arguments of counsel nor the reason for his Lordship's judgment are given in the report.

3. When the purposes of the bequest is part superstitious.

3. If the purposes to which a legacy is directed to be applied be not totally, but in part superstitious; the King, by the above statute of Edward 6, will be only entitled to that part of it which is applicable to the superstitious uses, unless the good uses be indivisible from, or made dependant upon the bad, and the whole will belong to him. To illustrate this; if A. grant an annuity of 20*l.* and direct that 10*l.* of it be appropriated for the purpose of procuring a chauntry priest, and the residue distributed annually among the poor, the King will be entitled to the 10*l.* only, specifically given to the superstitious use; but if

(u) 2 Myl. & K. 684.

(v) Ibid.

(w) 2 Beav. 151, aff.; 5 Myl. & C. 11, (1841).

(x) 7 Irish Equity Rep. 17.

(y) Ib. 34, in notis.

(z) As in *De Themmines v. De Bonneval*, 5 Russ. 288.

the direction were, that the annuity of 20*l.* should be applied in finding a priest, and maintaining poor men, without ascertaining the amount the former was to receive, the King would be entitled to the whole annuity discharged from the charitable use. Moreover, if no purpose were declared, to which the remainder of the annuity should be applied, after deducting the 10*l.* bequeathed for finding the priest, the King would take the whole; for it would be inferred, that the residue was intended to find the priest with necessaries. But if the annuity were given *conditionally, viz.* to *B.* upon condition to pay 10*l.* a year to a chauntry priest, the King would be entitled to the 10*l.* only (*a*).

Bequests to superstitious uses.

But where the donor of the fund to be devoted to a superstitious purpose, provides in the deed of disposition, that in case the purpose shall be adjudged void and incapable of being carried into effect, then the fund was to be in trust for his executors and administrators, the trust will be sustained, and the Crown will not be entitled. This was decided in *De Themmines v. De Bonneval* (*b*). There a sum of 3*l.* per cent. consols were invested in trustees' names, in trust to pay the dividends to the settlor (the plaintiff) for life, and after his decease, to apply the dividends in printing and circulating a treatise written for the purpose of inculcating the doctrine of the absolute and inalienable supremacy of the Pope; the deed of trust contained a proviso, that if at any time the purpose should be adjudged void, or be incapable of being carried into effect, the fund should be held in trust for the executors and administrators of the settlor, and be transferred accordingly. Sir *John Leach*, M. R., held the purpose void as against the policy of the law; but that the donor was entitled to have the fund transferred. The grounds upon which the judgment was founded seem to be, that there was no general purpose of charity expressed for the Court to effectuate; but that the gift was entirely conditional, and was to fail if the purpose could not be carried out; and that therefore it was not a case in which the Court could interfere on behalf of the Crown.

SECT. III. Of the restrictions imposed upon charitable bequests by the statute 9 Geo. 2, c. 36, and what charitable dispositions within its meaning.

In the preceding sections, we have inquired what are charitable,

(*a*) See *Att. Gen. v. Vivian*, 1 Russ. 226.

(*b*) 5 Russ. 288.

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c. 36.

and what superstitious, uses, and find that the latter are by the law of *England* illegal and void ; the former, on the contrary, are much favoured, though subject to certain restrictions, and we propose to consider, in the present section, what those restrictions are.

The determinations of Courts of Equity, respecting testamentary dispositions made to charitable or public purposes, have been founded upon very broad principles, not only in conformity with the Roman law, which shewed peculiar indulgence to such dispositions, but also on account of the nature of the dispositions themselves, which were not capable of the same confined and narrow construction as legacies given to private individuals. The Legislature, however, having found by experience, that the wise and provident Statutes of Mortmain were too often evaded by testamentary dispositions in favour of charities, and by judicial decisions upon those statutes, deemed it expedient to impose further restrictions. Accordingly, the statute of the 9 Geo. 2, c. 36, was passed, whereby it was enacted, " That from the 24th *June*, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out in the purchase of lands, &c. shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed, or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or encumbered by any person or persons whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, &c. of such lands, &c. (except stocks in the funds) be made by deed indented, sealed, and delivered, in the presence of two witnesses, twelve calendar months before the death of the donor or grantor, including the days of the execution and death, and enrolled in the Court of Chancery within six calendar months after its execution (*b*); and unless such stocks be transferred in the public books annually kept for the transfer of stocks, six calendar months before the death of such donor or grantor, including the days of transfer and death, and unless the same be made to take effect in *possession* for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement

(*b*) *Doe v. Howells*, 2 B. & Ad. 744.

whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him; provided always that such limitations, &c. shall not be construed to extend to any purchase or transfer made for valuable consideration (c). The statute then declares, "that all gifts, grants, conveyances, appointments, assurances, transfers and settlements whatsoever, of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money to be laid out or disposed of in the purchase of any lands tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, made in any other manner than by the Act is directed, shall be null and void;" with a proviso, that the Act shall not be construed to extend to the two universities, their colleges, and the scholars upon the foundation of the colleges of *Eton*, *Winchester*, or *Westminster* (d): with a further proviso, that no college, from *June*, 1736, shall be at liberty to purchase, acquire, receive, take, or hold more advowsons than are equal in number to one moiety of the fellows or students upon the respective foundations (e). And the Act also provides, that nothing therein contained shall be construed to extend to the disposition, grant or settlement of any real or personal estate lying or being within that part of *Great Britain* called *Scotland* (f).

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In the exposition of this statute it has been adjudged, that not only devises of land and bequests of money to be invested in land (g), are void, but also all such bequests as in any manner affect or relate to interests in real property. Thus, bequests to charities of money charged upon or to be raised by sale, mortgage, or otherwise, out of lands; also, terms for years; money due on mortgages, or to be invested in real security (h); money to pay off incumbrances affecting lands in mortmain; tolls, and money secured upon poor and county rates, have been adjudged void dispositions, under the provisions of the Act in question. We proceed in order to state the cases establishing the preceding remarks.

(c) See 9 Geo. 4, c. 85.

(d) See *infra*.

(e) Repealed by the statute 45 Geo. 3, c. 101.

(f) *Infra*; see 3 Russ. 328.

(g) See *Att. Gen. v. Ackland*, 1 R. & M. 243.

(h) *Baker v. Sutton*, 1 Keen, 224; *infra*, Sect. v. sub. sect. 4.

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dispositions
within the stat.
of 9 Geo. 2,
c. 36.

1. Money
charged on
real estate.

1. And *first*, money charged on real estate.

Thus, in *Arnold v. Chapman* (i), *Thomas Emerson* bequeathed 100*l*. and all his books to his executors *A.* and *B.*; he gave a copyhold estate to the defendant *Chapman*, he causing to be paid to his executors 1,000*l*.; and after payment of debts and legacies, the residue and remainder of all his estate, freehold, copyhold, leasehold, plate, rings, stock, &c. to the governors of the Foundling Hospital, and their successors, for ever. The executors brought a bill for 1,000*l*., to which there were several claimants; for, besides the charity, on whose behalf it was insisted, that the assets should be marshalled, and the debts and legacies charged on the real estate, that the personal might go clear to the charity, the devisee of the copyhold insisted, that the 1,000*l*. should not be raised at all; for that it was the same as if the condition was to pay to the charity, which was an unlawful act, that could not take effect, and therefore void, and the estate absolute. The next of kin insisted, that, as by the Statute of Mortmain it was void as to the charity, and as the particular devisee could not take without performing the condition, it should go as part of the testator's estate undisposed of, according to the Statute of Distributions. The executors claimed in their own right beneficially; and the heir claimed it as a resulting trust. Lord *Hardwicke*, C., declared, that the copyhold in the possession of the devisee was chargeable with the 1,000*l*. which ought to be raised, and in respect of which, he, in equity, was a trustee; but his Lordship disallowed the claim of the executors to it, who were to be considered as taking in the character of executors, and not beneficially; he also negatived the demand of the next of kin, who could only claim it as personalty, in which case the charity would have a prior claim; and with respect to the right of the charity, Lord *Hardwicke* thus expressed himself: "had he (the testator) devised the copyhold estate upon condition to pay 1,000*l*. to the governors, it would have been void by the statute; he has taken another method, by including it in a residuary bequest of real and personal estate: and it is said that they can take, because, by giving it to the executors, he has made it part of his personal estate; and he may, undoubtedly, if he please, turn it into personal estate; but it must be for lawful purposes. But here the Act intervenes, which, if this were allowed, would be easily evaded; for it would be only directing the real estate to be sold, and the money given to the charity; and in the case of *James* (j),

(i) 1 Ves. sen. 108; see also *Henchmon v. Att. Gen.* 3 Myl. & K. 485.

(j) Next case.

this was determined to amount to a devise of the land itself; because all charges, trusts, sums of money, &c. devised out of land to a charity, are made void by the Act." His Lordship then decreed, that the heir-at-law was entitled to the 1,000*l.* as a resulting trust.

Testamentary dispositions within the stat. of 9 Geo. 2, c. 36.

Money charged on real estate.

So, *secondly*, a bequest of monies to arise from the sale of real estate.

2. Money produced by sale of real estate.

Thus, in *Attorney General v. Lord Weymouth* (k), Sir John James by will, devised to his executors all his freehold and copyhold manors, messuages, lands, &c., and all his real estate whatsoever, in *trust to sell*, and pay the money with the intermediate rents and profits (all necessary charges deducted) to such persons and for such uses as he had thereafter given the same. He bequeathed 4,000*l.* to *E. James*; 4,000*l.* to *F. Calthorpe*; and to *F. Grigby* and *C. Ray*, 1,000*l.* to be laid out by them as a fund for certain charitable uses, which he forbore to mention, as they knew his designs as to charities; likewise 2,000*l.* to *F. Grigby*, for his care and trouble. He then directed his debts, funeral expenses, and legacies, to be paid out of his personal estate; but if deficient, such deficiency should be made good out of the money to arise from the sale of his real estate, or of the intermediate rents and profits; he bequeathed the money to arise by sale of his real estate, and the intermediate rents and profits, and also all his personal estate unto his said executors, in trust to pay one moiety to the governors of Bethlehem Hospital, for the support and benefit of incurable lunatics, and to pay the other half to the treasurers of a society, who called themselves the governors of *St. George's Hospital*, near *Hyde Park* corner, to be applied towards carrying on the designs of the said hospital. The information prayed that the testator's estate might be sold, and the money with the mean profits applied according to the will, and that the defect of the surrender of a copyhold estate to the use of the will, might be applied in favour of the charities, or that the whole estate might be so marshalled as would best answer the charitable purposes of the testator. To which Lord *Weymouth*,

(k) Amb. 20, see also *Paice v. The Archbishop of Canterbury*, 14 Ves. 364, *supra*; see also *Att. Gen. v. Harley*, 5 Mad. 321; *Waite v. Webb*, 6 Ib. 71; also *Flint v. Warren*, 9 Jur. 420, in which case there was an absolute conversion of the

testatrix's real estate into personalty to form one common fund, and Sir *L. Shadwell*, V. C., held that the charity legacies failed in the proportion of the proceeds of the real estate to the pure personalty.

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Money pro-
duced by sale
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the testator's heir-at-law, pleaded the Statute of Mortmain. Lord *Hardwicke*, C., observed, *first*, upon the true construction of the act of Parliament. "The words of that act import, first, that it shall not be in the power of any person to convey the lands themselves: *secondly*, that it shall not be in their power to charge or incumber them; and therefore it must be agreed, that no man can charge 1,000*l.*, 500*l.*, or even 100*l.* on any lands of ever so great value, to any charitable use whatsoever; and the present case is stronger, as it gives the whole residue (after payment of particular legacies, &c.) to a charitable use; not only the gift of lands themselves is made void by the act, but even any charge out of them:" and in the *next place*, upon the effect of the will, his Lordship said, "I am of opinion, that this is both a devise of the land itself, and a gift of the money (arising by the sale of the land, after payment of particular charges) contrary to the prohibition of the act. 1st. It is a gift of the rents and profits till a sale, and how long it will be before a sale, till what time it will be postponed, nobody knows; no man has a right to compel the trustees to sell, if they pay the debts and legacies, but the charity; and it being a devise of the rents and profits, it is a devise of the lands themselves. Then, as to the devise of the money arising from the sale, I do not think it necessary, in order to determine this question, to say whether it is to be considered as a devise of the land or money; but, whether the surplus is to be taken as money, or land, it is just the same thing. The prohibition is, that no manors, &c., shall be given, &c., by any manner of words, or anyways charged or incumbered by any persons whatsoever; and the subsequent clause makes void all charges and incumbrances for the benefit of a charity. Therefore, if the testator, instead of devising the surplus, had said, I charge my real estate with the payment of 1,000*l.* to a charity, it would certainly have been void by the express words of this act; and will it not then be extremely absurd to say he shall be able to give his whole real estate to be turned into money, for the benefit of a charity. It is impossible, in my opinion, to say, that such a devise as this can be maintained."

3. Vendor's
lien for pur-
chase money.

3. *Thirdly*, the vendor's lien for his purchase money.

In *Harrison v. Harrison* (1) it was decided, that a vendor's lien upon the estate for his purchase money was an interest within the 9 Geo. 2, c. 36. There the testator had entered into a

(1) 1 Russ. & Myl. 71.

contract for sale of part of his real estate, but died before the contract was completed, nor had any part of the purchase money been paid. By his will the testator gave his personal estate to charitable uses: and a question arose, whether, as the contract was completed after his death, the purchase money passed by the will to the charitable use; and Sir *John Leach*, M. R., held that it did not as being an interest within the statute of 9 Geo. 2, c. 36.

Testamentary dispositions within the stat. of 9 Geo. 2, c. 36.

Term for years.

4. *Fourthly*, terms for years are within the statute.

4. Terms for years.

In *Attorney General v. Graves* (m), a testator devised the residue of his real and personal estate to charitable uses. Part of the residue consisted of a term, not carved out of the inheritance by the testator, but vested in him as lessee. The question was, whether the bequest was within the Statute of Mortmain: and Lord *Hardwicke*, C., said, "I never was more clear, than that it is both within the intention and words of the statute. The words of the statute, '*any estate or interest whatsoever*,' were insisted to mean only, that a person should not devise his own land for any estate or interest whatsoever. No colour for that construction; these words relate back as well to lands and tenements as to personal estate. The annulling clause, which affords a construction on the other, annuls all estate or interest in lands and tenements, and there is no colour for that distinction on those latter words."

5. *Fifthly*. Money due on mortgage or mortgaged estates of which the mortgagee is in possession. 5. Mortgages.

Thus, in *Attorney General v. Meyrick* (n), *Oliver Jones*, being seised in fee of lands, in 1724, mortgaged them to *William Edwards*, for a sum of money and interest, which not being paid in time, *Edwards* the son bought an ejectment, obtained judgment, and sued out a writ of *habere facias possessionem*; under which being in possession, he made a will in 1744, wherein was this clause; "Whereas I am possessed of certain sums of money due by mortgage and other specialties secured to me on the estate of *Oliver Jones*, together with other effects, my will is, and I give all the said money in anywise due by mortgage, notes, or *assumpsit* on the estate of *Oliver Jones*, whereof I am now possessed by *habere facias possessionem*, and also all my personal estate, in trust to pay my debts, legacies and funeral expenses;

(m) Amb. 155.

(n) 2 Ves. 44.

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and afterwards, that the trustees should settle a place for the schooling and teaching so many poor boys, clothing them, &c., and to pay the master for such teaching, as the interest of the money I am possessed of by securities on the estate, late of *Oliver Jones*, will support and maintain; and I devise to them all the money due on that estate, to be laid out at interest on good securities, to apply the interest thereof to the maintenance of the said school for ever." The information was filed to have the charity established and carried into execution. Sir *John Strange*, M. R., considered, *first*, what interest could pass by the will, if the statute were out of the case? *Secondly*, whether that interest so passed did, or did not, come within the prohibition of that law? Upon the first point, his Honor observed, "By a gift of all mortgages to *Oliver Jones*, the whole beneficial right passes to him; and be the legal interest, either in the heir or executor, as it is a mortgage in fee or term for years, each will be considered as trustee for *Oliver Jones*, who will be permitted by the Court to use their names to get the money, or make the pledged estate his own by foreclosure. If it would be so in that case, then would it be equally so, though the phrase used, is *money due on mortgage*; where unless the Court construes it to pass the whole interest of the mortgagee, it will make it in effect a void devise, or at least put it in the power of a third person, whether the devisee shall take thereby or not: and it has rightly been compared to a devise of rents and profits, by which the land itself will pass: but if this is not sufficient, it is farther observable, that the devise in question is to them and their heirs of all the money due to the testator on the said estate; which must either pass the legal inheritance to them and their heirs or if that is still left behind in his own heir, he will be barely a trustee for them. Therefore, by such devise, the whole interest would pass to the devisees, who would be entitled thereby to every right the deviser himself had to compel payment of the money, or to make the estate their own by foreclosure;" and upon the second question, his Honor said, "this devise comes within the express and plain intent thereof. The design of the act was to lay a restraint upon every method whereby land might possibly come to such hands, unless by the manner therein prescribed; the first, part, therefore, is absolute, leaving however more liberty as to personal estate; but seeing that would not sufficiently answer the intent of the Legislature, if confined to land, it adds a prohibition as to personal estate, that it should not be given to be laid out in the purchase of land. But was there no other way

whereby the interest in land might come to a charitable use? Yes, money due on mortgage was a charge and incumbrance on land, the payment of which depended on the pleasure and ability of the mortgagor, therefore the Parliament has by express words taken in this by the third clause, the words of which, if they do not extend to the case of mortgages, I am at a loss to know for what purpose they were put in. The meaning was, that you shall not give to a charitable use that which is or may be a charge on land, though not so at the time of the gift. Suppose a sum of money is devised to be put out on a mortgage of freehold lands; is not this restrained by the act? If then a mere personal chattel may not, will it better the case, that at the time of the gift it is actually vested, and how absurd would it be in the Parliament otherwise. Though, by the first clause, securities for money are allowed to be given under the requisites of the act, yet the subsequent words of that clause afford an argument, that mortgages affecting lands actually at the time of the gift, will not come within the meaning; as there may be other securities for money not immediate liens on lands, as debts, bonds, &c. I should think that on the first clause, mortgages are prohibited; but if doubtful on the first, the words of the other clause take them in expressly, and on that latter clause chiefly, I found my opinion. The cases show the Courts have made as liberal a construction to prevent the mischief as possible."

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of 9 Geo. 2,
c. 36.

Mortgages.

Again, in the case of *Attorney General v. Caldwell (o)*, *William Moore* gave the residue of his personal estate in these words; "My will is, that the remainder of all my effects, annuities, mortgages, bonds or notes, with my household furniture, &c. be sold, and what money they shall sell for, I give to the two charity schools for boys and girls of *St. Andrew's, Holborn*, now kept in *Hatton Garden*, towards their education and clothing for ever, to be divided into two equal parts, half to each school." One of the questions was, whether the bequest so far as related to the mortgages, was void, by the Statute of Mortmain? and the Master of the Rolls was of opinion that it was void.

In *Johnston v. Swann (p)*, the residue was bequeathed for certain charities, and it was held that 1,000*l.* due on mortgage, and forming part of the residue did not pass, the bequest as to that being void within the Mortmain Act.

(o) Amb. 635; see also *Howse v. Chapman*. 4 Ves. 542; *Chapman v. Brown*, 6 Ves. 407.

(p) 3 Mad. 457, 467, *infra*, Sect. iv.; see also *Baker v. Sutton*, 1 Keen, 224.

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dispositions
within the stat.
of 9 Geo. 2,
c. 36.

6. Money given
to exonerate
land in mort-
main.

6. *Sixthly*.—A bequest of money to *exonerate* lands in mortmain.

Thus, in *Corbin v. French (q)*, *John Brown*, by his will, in *June*, 1785, directed the residue of his estate and effects to be disposed of, and the money paid to his trustees, to be placed out at interest, in trust, to pay such interest, to his wife *Elizabeth*, for life; and after her death, he ordered 500*l.* to be paid to the trustees of the chapel in *Essex-street*, (whereof the Reverend Mr. *Lindsay* and Dr. *Disney* were ministers), to be applied by them towards the discharge of the mortgage upon the said chapel; and, after some other legacies, he gave the remainder to *Josiah Messer* and the plaintiff equally; and appointed *Messer* and the defendant, whom he had nominated trustees, and *Stacey*, to be his executors. Upon the bill of one of the residuary legatees, it appeared from the answer of the trustees of the chapel, that the chapel or the equity of redemption thereof, subject to a mortgage, on which was then due, 886*l.* 10*s.* and some interest, was, in *January* 1783, conveyed to trustees in fee, for public worship; and that the chapel, and premises belonging to it, were on the 25th of *March* 1779, conveyed to *G. Kettle*, in fee, for securing 1,000*l.* and interest; which principal sum had been previously advanced by *Lindsay*, and for whose benefit *Kettle* was a trustee. That on the 6th of *December* 1781, 113*l.* 10*s.*, part of the 1,000*l.* was paid off; and 886*l.* 10*s.* the residue of that sum, was discharged on the 19th of *March* 1785, by a donation. That the same premises were re-conveyed by *Kettle*, by *Lindsay*'s direction, to the persons, who, at that time, were trustees of the chapel; and that the mortgage was so paid off in the testator's lifetime, and before the date and execution of his will. The questions were, *first*, whether the legacy to the chapel was void, within the statute? *secondly*, if not whether, the express purpose of it having been satisfied by other means, that institution could have the benefit of it for any other purpose? It was insisted, that being in its nature a charitable use, the bequest of the money to be applied in redemption of the mortgage was within the Statute of Mortmain, the object of which was to prevent the devises of land, or any interest in land or bequests of money to be laid out in any such interest, for any charitable use whatsoever. It was likewise insisted, that if the legacy were not void under that statute, inasmuch as at the death of the testator the mortgage was paid off, and therefore

that object could not be attained, it was not applicable to any other purpose for the benefit of that society; and as the object pointed out by the will could not arise, the fund would belong to the residuary legatees. Lord *Alvanley*, M. R., said, "I am in their favour upon both points: but it is not necessary to dwell long upon the second, if I am right upon the first. It was insisted, that there had been repeated determinations, that it is competent to a testator, though not to give directly any interest in land to a charitable use, to leave a sum of money for the purpose of meliorating, as it is called, any land, or for beautifying, sustaining or repairing buildings, already vested in trustees for charitable uses (r); and no doubt, I believe, is now entertained upon it; and many cases have been determined upon the distinction, whether it is clear, the testator meant the money to be applied in erecting, sustaining, or repairing buildings upon land already vested in trustees for charitable uses, or had any object of having fresh land purchased for that purpose. It is said, this case is analogous to those cases, in which the Court has established in favour of a charity, a disposition, not of an interest in land or of a sum of money bequeathed for the purchase of any interest in land, but for the purpose of meliorating an estate already vested in trustees for charitable uses. I am of opinion, that cannot be considered as the true construction of this gift. The words of the statute, which go far beyond the title, are very express. It is called 'An Act to restrain the disposition of Lands, whereby the same become unalienable.'" His Lordship, after stating the three first clauses of the statute, as set forth in the beginning of this chapter, proceeded, "Upon the third clause, this question arises, whether this is, or is not, a legacy to be applied in the purchase of an interest in land, or a charge or incumbrance affecting the same. I am of opinion, this is directly in words given for that purpose. It is nothing but a sum of money given for the purpose of procuring first, and then conveying to the trustees, this farther, greater, and more extensive interest than they had before. I should be sorry to refine upon the statute, or to be more rigorous in the construction, than former decisions warrant: not that I wish to defeat the statute, but I wish to construe it fairly. The Court has gone so far as to hold, that a sum of money, secured upon turnpike tolls, is an interest in lands within the Act (s). I put the case of the

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(r) The cases stated *infra*.

(s) *Knapp v. Williams*, 4 Ves 430, note, *infra*.

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trustee having contracted for the purchase of an estate, and money being left to enable him to complete that purchase. The counsel for the charity could not say, that would not be within the statute. Suppose a part of the money was paid, and part not; if the whole could not be applied, no part could. Where is the difference? till the mortgage was paid off, the trustees had not that purchase. I am therefore of opinion, that this sum of money bequeathed to redeem the mortgage upon this chapel, is void by the statute. If I am right upon that point, perhaps the other consideration is immaterial: but as the point was made, I will say a few words upon it, for the purpose of having the *Attorney General v. The Bishop of Oxford* (t), which has been mistaken, perfectly understood. The true question is, can any intention be collected beyond that of securing to them the enjoyment of this building; any intention, that after having provided for that object, if the whole was not necessary for that, the surplus should be applied for any other beneficial purpose in favour of the society? I am of opinion, no such intention can be collected. I will not say, that if this legacy was not void by the statute, it might not be applied to sustaining and repairing that building; but that it can be applied to any other purpose, I deny, if the *Attorney General v. The Bishop of Oxford*, be right."

Notwithstanding
the charge
only equitable.

Again, in *Waterhouse v. Holmes* (u), the testatrix bequeathed 400*l.* to the trustees or treasurer for the time being of the Methodist Meeting-house at *Baildon*, in the county of *York*, to be applied towards paying off any sum of money which might be due or owing on the meeting-house at the time of her decease, and the overplus, if any, to such other purposes of the meeting-house as the trustees or treasurer should in their discretion see fit. In pursuance of a reference, the Master found, that at the time of the testator's decease, there was a debt of more than 400*l.* due upon the meeting-house to the subscribers of a fund, out of which the land and the meeting-house thereon had been paid for; and that the subscribers held the title deeds claiming to be entitled thereto, as equitable mortgagees for the amount of their respective subscriptions. It was insisted on behalf of the treasurer of the meeting-house, that the Mortmain Act only applied to legal interests, but, if to equitable interests also, then that the discretionary power of the trustees to apply the fund for other purposes, which were not within the statute, entitled them to

(t) *Infra*.

(u) 2 Sim. 162.

claim the whole fund as overplus, if the fund were not required for discharging the debt. Sir *Lancelot Shadwell*, V. C., decided that the bequest was void as within the statute; with respect to which there was no substantial difference between a legal and equitable mortgage, and that the option was given only in the event of there being no debt on the meeting-house.

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Money to exonerate lands in mortmain.

7. So also in the *seventh* place, money secured on *turnpike tolls* is within the statute as mentioned in the preceding case of *Corbyn v. French*.

7. Money secured on turnpike-tolls.

Thus, in *Knapp v. Williams* (v), the defendants were governors of the charity for the relief of the poor widows and children of clergymen; and claimed a mortgage for 500*l.* upon the tolls arising under certain Acts of Parliament, for the repair of the *Brentford* turnpike road. The security was taken upon the tolls simply; not including the toll-houses and gates. Lord *Loughborough*, C., in deciding against the claim of the defendants, said: "It occurred to me, that it had been determined that a mortgage of turnpike tolls is within the statute. The mortgagee would have a right to come into this Court to have an account, and a receiver appointed. He would have a right by the aid of this Court to have the tolls specifically applied to his mortgage. Consider what the point of law is, from the nature of the interest. It is not at all within the mischief: but the consequences would open a much larger field for charitable donations. From the nature of the interest created by the Act, these tolls granted in perpetuity are certainly an hereditament: it is in its nature an interest affecting land. He might bring an assize for these tolls, I should think."

8. So *eighthly*, navigation shares in canals and rivers being real estate (w), are also within the statute. In the original decree in the case of *Howse v. Chapman* (x), stated for other points on a former page (y), part of the residue of the testator's property directed to be sold and applied for charitable purposes, consisted of a share in the *Bath* navigation, and the Lord Chancellor held that the devise was void, and the heir-at-law was entitled to the share.

8. Canal and navigation shares.

(v) 4 Ves. 430, note.

(x) 4 Ves. 544.

(w) *Buckeridge v. Ingram*, 2 Ves. 652.

(y) Pages 986, and 1116.

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dispositions
within the stat.
of 9 Geo. 2,
c. 36.

9. Money se-
cured upon the
poor and coun-
ty rates.

9. So *ninthly*, a bequest of money, secured upon the *poor rates* and *county rates*, is within the Act of 9 Geo. 2, c. 36.

Thus, in the case of *Finch v. Squire* (z), a testator, by will executed according to the Statute of Frauds, bequeathed the residue of his personal estate, in certain events (which happened) to the defendant *Squire*, upon trust to pay the same to the treasurer for the Society for promoting Christian Knowledge. Under a decree in the cause for an account of the personal estate of the testator, it appeared by the Master's report, that part of the personal estate was lent upon security of the poor rates and county rates for building a goal, under Acts of Parliament, giving authority to borrow money, and assign the rates for that purpose. The plaintiff, the treasurer of that society, claimed the money so lent upon the poor rates: for whom it was insisted, they could not be considered a security upon land, or within the mischief of the Act of 9 Geo. 2, c. 36; as they were only a personal aid, and the county rates only a part of the poor rates, the remedy for which was a warrant of summons followed by distress, clearly a personal remedy: and they distinguished them from the case of tolls (a); but Sir *William Grant*, Master of the Rolls, decided in favour of the next of kin; observing, "There is no solid distinction between money borrowed upon such a security as this, and money borrowed upon turnpike tolls. It is difficult to shew, that a charity, by taking money borrowed upon the latter security, takes any interest in land. Those tolls are duties imposed by Act of Parliament upon passengers, in respect of their passage along the road. The right to collect these tolls gives no direct interest in the land itself, though an interest in duties arising in consequence of a passage along or through the land. The poor-rates are made payable by those who are occupiers of lands, tenements and hereditaments; if a man is not occupier of lands, he pays nothing, unless he has other property: but if he has only land, he pays in respect of that. A very nice distinction was taken for the plaintiffs, that the public make him contribute, as having the land, not on account of the use of the land. That distinction is not very perceptible. In the one case, the public call for the duty on account of the passage along the land, that it may be laid out for the purpose of public advantage, the repairs of roads, and facilitating communication: in the other case, they actually burthen the lands, by burthening the occupier with the

(z) 10 Ves. 41.

(a) *Knapp v. Williams*, last page.

duty, for other public purposes of convenience and advantage. It is true, they are not raised out of the land only: but by far the greatest part is raised out of the land; for the land pays so much rent in consequence of the occupier being liable to the poor rates: otherwise the landlord would have more rent. So all that is paid in respect of the land, is got from the land, as much as rent arises out of the land itself. It is more properly to be said to arise out of the land, because it is in respect of the occupation, than the tolls for the mere privilege of passing. As to that part of the poor rates, that is raised out of the personal property, it cannot be distinguished; I cannot divide and apportion the security; that so much is to be imputed to the produce of land; and so much is from personal property. I must take the whole. They are so blended, that it is impossible to distinguish them. If the consequence of their holding this security would be, that something real would go to the charity, it must fail altogether. That is the necessary consequence; for it must be the security as it stands; that is, such a security as charges the poor rates in the mode and manner in which they are collected. Therefore these securities cannot pass to the charity."

Testamentary dispositions within the stat. of 9 Geo. 2, c. 36.

Judgment debts.

10. So in the *tenth* place, a judgment debt due to the testator, which in his lifetime had been reported in a creditor's suit to be an incumbrance affecting the real estate of the debtor, is within the statute 9 Geo. 2, c. 36.

10. Judgment debts.

Thus, in *Collinson v. Pater* (b), the testator bequeathed all the residue of his personal estate to trustees upon trust to convert the same into money, and invest the produce in Government securities, and apply the annual produce upon certain charitable purposes. Part of the testator's residuary estate consisted of a judgment debt, which was paid out of the proceeds of the sale of the debtor's real estates, his personal estate being insufficient: the question was, whether the gift to charitable purposes was not void so far as respected the judgment, and Sir *John Leach*, M. R., decided in the affirmative.

11. Another instance of property within the 9 Geo. 2, c. 36, which shews the inclination of the Courts to carry out the intention of the act to its very letter, is the profits arising from mooring chains in the river *Thames*.

11. Profits from mooring chains in the *Thames*.

This was decided in *Negus v. Coulter* (c), where the testator

(b) 2 Russ. & M. 344.

(c) Amb. 367.

Testamentary dispositions within the stat. of 9 Geo. 2, c. 36.

being possessed of a lease for years from the Crown, of the right to lay chains in the river *Thames*, between *Buchy's Hole* and *London Bridge*, for mooring of ships, and of all profits arising therefrom, by his will devised the same to charitable uses, &c. Sir *Thomas Clarke*, M. R., held the gift within the statute, it being an interest in the inheritance, and as much a franchise as a market, which might be in other persons than the owners of the soil.

12. Where a bequest to particular objects in the first instance, is attended with an ultimate charitable disposition within the statute.

12. In this place it will be proper to direct the reader's attention to the following rule of construction; that, where a testator mentions particular objects in his will, which are in the first instance to enjoy the benefit of a bequest, intended ultimately as a general charity, and which objects appear to be more immediately within his view or intention, in such a case the Court will support the disposition in favour of the persons described, though it fail as a general charitable disposition within the Statute of Mortmain.

1. Where the two objects are not inseparably blended.

1. Where the two objects are not inseparably blended.

Thus, in *Blandford v. Fackerell* (c), *Edward Fackerell*, after providing by his will for a weekly payment of four shillings to his cousin, *James Fackerell*, gave all his real estate to trustees, in trust to sell, and the money arising from such sale, and from the sale of his personal estate, to be laid out in 3*l.* per cent. consols; the dividends to be first applied in payment of the annuities, and the weekly sums given by his will, and then to apply the residue according to a direction of the testator in his will; which was, "I do hereby direct, that, as soon as conveniently may be after my decease, a proper and commodious house in the town of *Bridgewater*, shall be taken by my trustees on lease or otherwise, at such yearly rent as shall be agreed upon, and fitted up for a school, for the reception and education of the children and grandchildren of my relations, (naming them), as they shall respectively attain their ages of seven years; I will and direct, that my said trustees shall place and clothe in the school, &c. until their age of fourteen years, and then to put them apprentices, &c.; and that my said trustees shall also admit and take into the said school, such number of boys and girls (the boys being two to one of the girls), as the yearly income of my trust stock will be sufficient to educate, after payment of rent, &c.,

the salary of masters and mistresses, and other purposes there mentioned." He then gave several regulations for the charity, and made the trustees executors. The question was, whether this charitable disposition was totally, or in what degree, void by the Statute of Mortmain: and the Lord Chancellor said, "The first object of the testator is to give education to these children and grandchildren, and then that a benefit should arise to others from his bounty. I can only devise a plan for the education of the objects of his bounty, and direct an inquiry who are such: as far as it tends to establish a charity for general purposes, it is void by the Statute of Mortmain."

Testamentary dispositions within the stat. of 9 Geo. 2, c. 36.

Where particular purpose and general charity blended.

So also, in *Doe v. Aldridge (d)*, *William Phillips* devised as follows: "To the Rev. *A. Aldridge*, late of *Amesbury*, in *Wiltshire*, but now preacher at the meeting-house, in *Lyndhurst*, all, &c., (describing the premises), to hold to him for life only, upon this express condition, that he do and shall, without delay, after my decease, settle and convey the same to trustees, to take place at his decease, for the use and support of the preaching of the Word of God, at the meeting house at *Lyndhurst* aforesaid, for ever; and in case such preaching should be discontinued, I direct the same to be applied towards a school for teaching the poor children of *Lyndhurst* aforesaid, for ever: and I do hereby give unto the said *A. Aldridge*, full and absolute power and authority to settle the same accordingly." Then followed a bequest of money in the funds to the same uses; legacies of 100*l.* to the defendant and the other executor, for their trouble in executing the will; and a bequest of the furniture in the house in question to the defendant for life, with a direction to settle the same to the use of the succeeding ministers, to go as heir looms: and besides some other legacies, the will contained the following clauses: "And I further expect that he (the defendant) will, with the help of God, after my decease, without delay, settle and forward every thing in his power, to promote and carry on the work of God, at *Lyndhurst* aforesaid, both in his lifetime and after his decease." "And, if it should so happen that I have not left any of the aforesaid legacies in a lawful and legal manner, to prevent any advantage being taken thereof, I do hereby give, devise, and bequeath such legacy or legacies unto the said *W. Downer*, and *A. Aldridge*, in trust, to be disposed of by them at their discretion for ever." The Court thought the point too clear for discussion. For that, though the subsequent limitation

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was void, the defendant's life estate was clearly good; that the religious persuasion of the defendant raised no ground of objection to his taking the estate; and that the devise over to the school, in case the preaching should be discontinued, only related to the limitation after the defendant's death.

2. Where the
particular ob-
ject and the ge-
neral charitable
purpose inse-
parably
blended.

2. But from the determination in *Grieves v. Case* (e), it appears, that if the bequest to the persons named be so blended with the purpose of the charity as to depend entirely upon it, and no inference of an intention arises that a personal benefit was meant for the legatees, independent of such charity; the devise in favour of the persons described will be considered an indivisible part of the general charity, and consequently void.

A similar principle may be collected from the case of *Attorney General v. Davies* (f); namely, that where the primary gift is void by the Statute of Mortmain, and a secondary gift is made, which, standing by itself, would be good, but which is so blended with the primary gift as to make a component part of it; in such case the secondary gift fails also.

Thus also, in the case of *Attorney General v. Hinzman* (g). There *James Hinzman*, by will, in 1814, devised a messuage and premises, called *Waldings*, to *Martha Brown* for life, if she continued unmarried; and after her decease or marriage, he devised the same to his executors, in trust, that the same might be appropriated to the use of the master that might be appointed to a school, for the instruction of poor persons belonging to the parish of *Week*, for so long a time as his interest therein should continue. He desired his executors, out of his personal estate, to put this house into decent and habitable repair; and, till that was done, *Martha Brown* was to be permitted to reside in the house in which she then lived. The will contained, in a subsequent part, the following clause: "And I do desire and direct, that my executors, hereinafter named, shall lay apart from my personal estate, the sum of 2,000*l.*, and invest the same in the purchase of stock, in the names of the minister, churchwardens, and overseers of the poor of the parish of *Week* aforesaid, upon trust, that they, the said minister, churchwardens, and overseers, do pay and apply the interest, dividends, and produce, of so much thereof as they may think necessary, in procuring a master and mistress for instructing poor children in reading, writing, and needlework,

(e) *Infra*, p. 1145.

(f) *Infra*, sect. iv.

(g) 2 Jac. & Wal. 270.

and bringing them up in the principles of the Established Church, and keeping the school-house in decent repair: and upon this further trust, that they do pay, apply, and distribute, the residue, if any, of the said interest after produce, and payment of the expenses of the said school as aforesaid, unto and amongst such poor families and persons, parishioners of and resident in *Week* aforesaid, at such times, and in such proportions, as the said minister, churchwardens, and overseers shall think proper." By a codicil, alluding to the will, as "minutes of instructions in writing for his will," he gave the residue of his estate and effects to *H. S. D. King*; and he gave to his executors the sum of 1,000*l.* in aid of the sum of 2,000*l.* he had directed to be appropriated for the endowment or purposes of a school for children, in manner in such minutes mentioned. The house called *Waldings* was of copyhold tenure, held for three lives; and the testator had, previously to making his will, by deed dated in *June*, 1811, covenanted to surrender it to the use of *H. S. D. King*, his heirs and assigns, upon trust, for himself for his life, and after his death, to the proper use of *H. S. D. King*, for his life, and the lives for which it was held; *King*, by the same deed, covenanting to devote his time to the management of the testator's business. The testator surrendered the house pursuant to his covenant; the surrender being, as it was stated, subsequent to the date of his will. He died in 1814, and *King* was soon afterwards admitted. The present information was filed to have the 3,000*l.* legacy applied to the charitable purposes directed in the will. The question was, whether there was such a connection between the devise of the reversionary interest in the house, which was void by the Statute of Mortmain, and the pecuniary legacy as to occasion a failure of the latter. The Master of the Rolls observed: "The question may be considered rather as one of construction, than as involving any controverted point of law; for it is admitted, that if the legacy be inseparably connected with the primary gift, which is a devise of land, and therefore void by the Statute of Mortmain, the legacy must also fail; on the other hand, it cannot be denied, that if we could, in any way, separate the bequest from the devise, it might stand. This, I think, is the fair result of the argument on the law; and taking that to be settled, we have to consider whether this is a connected or a separate bequest in favour of a charity; and though the Court would certainly feel a strong disposition to effectuate the purposes of the testator, yet I do not know that it is inclined to refuse to parties the benefit of the statute; for we must

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of 9 Geo. 2,
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Where parti-
cular purpose
and general
charity
blended.

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Where particular purpose and general charity blended.

remember that it is the policy of the law which prevents these applications of property: it is a question between the statute on the one side, and the charitable design of the testator on the other. The testator, after the death or marriage of *Martha Brown*, gives the house called *Waldings* to his executors, in trust to be appropriated to the use of the schoolmaster that may be appointed. This is a disposition of the remainder expectant on the determination of the life estate, under which the master would be entitled to call for the benefit and enjoyment of the house. It was given for so long a time as his interest should continue; it seems that it was a copyhold for lives, and I suppose might be renewed; thus it was to be permanently devoted to the use of the master. That devise is undoubtedly bad; whether it was or was not revoked on the face of the will, it is bad." With reference to the gift of the residue, his Honor observed, that the authorities showed that where the first gift was to a void charity, and the quantity undefined, the bequest of the residue failed; and after citing the cases of *Attorney General v. Davies* (*h*), and *Chapman v. Brown* (*i*), he decided that the bequest for the benefit of the school was so connected with the primary gift that it failed; and the amount to be thus appropriated being unascertained, the gift of the residue, which depended upon it, was also void.

In the later case of *Price v. Hathaway* (*j*), the donor by bargain and sale dated the 21st of July, 1820, conveyed real estate to trustees to charitable uses: the deed was enrolled a few days after the execution, but the donor died within twelve calendar months after. By will dated the 25th of the same *July*, reciting the deed, and that he was desirous of bequeathing a competent sum for supporting the charity, the donor directed his executors to transfer 30,000*l.* three per cent. consols into trustees' names, the dividends to be under the management of the trustees, and to be applied for furthering the charitable purposes of the deed. The deed being void under the Mortmain Act, Sir *John Leach*, V. C., decided that the pecuniary bequest depending on the validity of the deed had failed also.

SECT. IV. Of testamentary Dispositions *not* within the Statute of 9 Geo. 2, c. 36.

Testamentary dispositions to charity not within the stat. of 9 Geo. 2, c. 36.

In the following section, we proceed to consider those testamentary dispositions, which are not within the restrictions of the

(*h*) *Infra*, sect. IV.

(*i*) *Infra*, *ib.*

(*j*) *Mad. & Geld.* 304; see also *Att. Gen. v. Hodgson*, 10 *Jur.* 300.

9 Geo. 2, c. 36. It is almost unnecessary to premise, that all bequests to charitable or public purposes, of money and other personal estate, not partaking of the nature of or otherwise affecting real estate, as shewn in the preceding section, are valid; and of this, almost all the cases on charitable uses, present examples.

Testamentary dispositions to charity not within the stat. of 9 Geo. 2, c. 36.

1. We pass on to consider those cases of bequests to charitable uses, wherein the obligation upon the trustees to *realize* the money bequeathed is not *imperative* or *directory*, but it is merely left to their *discretion*; in the former case, the dispositions are void; in the latter, they have been supported, upon the principle that the trustees or executors in whom the discretion is vested, are not to be presumed desirous, or at least ought not to be permitted, to exercise that discretion, to the prejudice of legatees.

1. Where the direction to invest in real estate is not imperative, but discretionary.

The object of the Court, therefore, in such cases, is, first, to determine the meaning of the dispositions; and here we present the reader with a few instances, wherein the words of the bequest have been considered as imposing an *imperative* obligation upon the trustees to invest the funds in real estate.

Instances where direction to invest imperative.

Thus, in *English v. Ord* (*k*), *John English*, by his will gave his debts, securities and ready money, to trustees, in trust until they could meet with a purchase of lands, and should actually purchase the same, to pay the interest of 120*l.* among such poor and necessitous persons, inhabitants in the town of *H.* as his executors should think proper objects of charity: and the testator willed that the trustees, so soon as they could meet with a suitable purchase, should lay out 120*l.* in the purchase of an absolute estate of inheritance, in messuages, lands, &c., to be settled in trustees for ever, in trust to pay the rents, &c. Sir *T. Clarke*, M. R., said, that the Lord Chancellor declared, that he did not think the case of *Grimmett v. Grimmett* (*l*), clear, and that if there had been express words of direction to trustees to invest, &c., it would be within the statute. He was of opinion that the second clause was *directory*, and not discretionary, and he was not for carrying the case further than *Grimmett's*; and therefore decreed the devise void.

So, in the case of *Grieves v. Case* (*m*), a testatrix having endowed the chapel of *Fakenham*, directed by her will that 600*l.* should

(*k*) Higmore, 181.

(*l*) *Infra*, p. 1150.

(*m*) 4 Bro. C. C. 67; 1 Ves. jun. 548.

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be invested in freehold lands, or copyhold with fine certain, and the rents applied to pay some small annuities. All the residue she directed to be paid in equal moieties, one to her friend *T. Mendham* for life, the other to her friend *Eastaugh* for life, and after the death of *Mendham*, one-third part of the interest or rents to be paid to the preacher or teacher, who should statedly officiate in the chapel at *Bristow*, belonging to *Mendham*: the two remaining thirds to *Eastaugh* for life, he and the said preacher exchanging upon the Lord's day alternately, the one at *Fakenham* the other at *Bristow*; provided that *Mendham* and *Eastaugh* did not voluntarily withdraw from and refuse officiating, when able, at the said *Fakenham* chapel as usual; if they did the share of him or them, during such recess, to cease and go to the preachers appointed in his or their room; and after the death of the survivor of *Mendham* and *Eastaugh*, the interest or rents to be paid for ever to the successive preachers who should be chosen by the trustees of *Fakenham*, and the trustees and major part of the communicants of *Mendham's* chapel, at *Bristow*. Provided also, that in case of *Eastaugh's* apostacy, he should take nothing under the devise. The bill was filed by the testatrix's co-heiresses, and a decree, which had been made by Lord *Thurlow*, contained a declaration, that the devise was not to be considered void, so far as it respected the immediate annuitants. Upon farther directions, two questions were made; whether, in order to support this charity, it was not possible to consider the trustees, as not bound to lay out the fund in land: and if not, whether the interests of *Mendham* and *Eastaugh* could be maintained, as being separated from the charitable trust, and intended as a personal bounty and favour to them. *Eyre*, Lord Commissioner, in deciding, said, "The question made by the Attorney General, must be first noticed, whether this can be a good disposition to a charitable use, in respect of it being possible to lay out the fund otherwise than in land. For that *Grimmett v. Grimmett* (n), was cited. The whole of that case rests upon a critical comparison of words. The words in that case were, 'such purchase as is to the satisfaction of the trustees.' If the question could be rested upon the similarity or synonymy of the two cases, it would be a fair argument. But I think, without saying whether I approve of that case or not, that this is substantially distinguishable; and upon the ground stated by Lord *Hardwicke* there: for he says, if it had been a disposition of money to be laid out in land, he

(n) *Infra*, p. 1150.

should have been obliged to have said, it was within the statute. Now, this is that very case. Therefore the case cited will not apply; and it stands upon so much nicety, that it is not proper to extend it to cases, in which every part of the circumstances of that case do not occur. This devise therefore is void within the Statute of Mortmain. The next consideration is, whether these two persons are to be considered as having an interest detached from the trust, so as to be separated from the trust, though that should be condemned? I am of opinion, that if the personal bounty cannot be totally separated from the general object, in respect of which they are to have that preference, it is not sufficient. It was manifestly her intention to make a general provision for the two chapels; to suspend that as to one till the death of *Mendham*, and continue it as to the other from the moment of her death, and during his whole life; and consequently there is a charitable use subsisting from the moment of her death as to *Fakenham* chapel; and these persons have this bounty only, in respect of that charitable disposition. Consequently their estate cannot be separated from the trust; and if that fails, this, which is a part of it, must also fail. Therefore the whole of this disposition after the annuities, will fall under the general objection of a disposition of money to be laid out in land for a charitable use." *Ashurst*, Lord Commissioner, concurred.

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To the preceding cases that of *Kirkbank v. Hudson* (o) may be added. In that case *Richard Dickenson* bequeathed the residue of his personal estate to be a perpetual endowment or maintenance for two schools, and he appointed *Thomas* and *Samuel Hudson* (trustees), and the survivor of them, and the rectors for the time being of the parishes in which the schools were and their successors for ever patrons of such schools, with certain directions as to their conduct; and proceeded thus: "I recommend that at a convenient time my money shall be collected together, and laid out in the purchase of a freehold messuage and tenement, or lands which are freehold, to be a perpetual endowment for the two schools." The next of kin of the testator filed their bill to obtain a declaration by the Court that the bequest was void, and for an account, &c. *Richards*, Chief Baron, upon the words of the will above stated, observed, that the question entirely turned upon the construction, whether the words were mandatory upon the trustees, and that they must, in all events,

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lay out the money in lands; or whether they might not so lay it out, if they should not think it advisable. If they were obliged so to lay out the money, the bequest would be void certainly; if, on the other hand, an option had been given to the executors, it was hardly necessary to say, that they might legally give effect to the bequest: and after commenting on the cases upon the construction of the word "recommend," the Chief Baron considered the case in question within all those which had been considered cases of trust, and which must be executed.

In *Pritchard v. Arbouin* (*p*), the bequest was of the remainder of a sum in the three *per cent. consols*, upon trust to sell the same when an opportunity offered for *building* a chapel for the worship of the New Church, (meaning a church for worship according to the doctrines of Swedenborg) and to contribute the same towards the building and its support. The Master found that there was at the date of the will no chapel of the "New Church" built on freehold ground, but that two had been built since. Sir *John Leach*, M. R., decided that the bequest was void, upon the authority of *Attorney General v. Davies* (*q*), and observing that it was a settled rule, that a direction to build was to be considered as including a direction to purchase land for the purpose, unless the testator pointed to land already in mortmain.

In *Mann v. Burlingham* (*r*), the testator directed the executors to purchase so much freehold land as could be bought for 100*l.*, for a charitable purpose, adding, in case land could not be conveniently purchased within twelve months after the testator's decease, to pay twenty shillings per quarter for such charitable purpose until such purchase could be made. Lord *Langdale*, M. R., held that this bequest did not give the executors such a discretion as to take the gift out of the Mortmain Act.

In *Mather v. Scott* (*s*), a testator gave the residue of his personal estate to his executors and other persons, with a request that they would entreat the Lord of the Manor of *Devonport* to grant a spot of ground suitable for the erection of dwellings to be appropriated to a charitable purpose. Lord *Langdale*, M. R., held that the bequest did not clearly exclude a purchase of the land, and that even if it did, it was void under the Mortmain Act.

We now add some cases as instances in which the bequest

Instances where a discretion is given to realize.

(*p*) 3 Russ 456.
(*q*) 9 Ves. 544.

(*r*) 1 Keen. 235.
(*s*) 2 Keen. 172.

has been considered as giving a *discretion* to the trustees or executors.

In *Sorresby v. Hollins* (t), *John Naylor*, in 1738, bequeathed as follows; "I will and desire that my executors, within twelve months after my death, do settle and secure by purchase of lands of inheritance, *or otherwise*, as they shall be advised, out of my personal estate, one annuity of 50*l.* to be paid yearly and distributed for ever by my executors, their heirs and assigns, among the poor and indigent people of *Leeke*, in the county of *Stafford*, in such manner as they shall think fit: and my will also is, that my executors do settle and secure one other annuity of 5*l.* to be paid yearly to the vicar of *Leeke* for ever, for preaching an annual sermon on every 12th day of *October*." The testator gave the residue of his personal estate to be equally divided between his sisters *Sorresby* and *Hollins*. Lord *Hardwicke*, C., observed, "The only question in this case is, whether the devise of the two annuities of 50*l.* and 5*l.* to charitable uses is void by the late Statute of Mortmain? It is insisted by the plaintiffs the residuary legatees, that it is void, because the direction of the devise is to settle and secure the annuity by a trust of lands of inheritance; and though the words *or otherwise* are added, they will not vary the case; for the testator's intention was, to give the annuity out of lands of inheritance. But I am of opinion, upon this Act of Parliament, that this bequest was not void, and that there is no authority to construe it void, if by law it can possibly be made good. Though there is a clause to prohibit money being laid out in lands, to such purposes as would make them unalienable, yet there is no restriction whatsoever upon any one from leaving a sum of money by will or any other personal estate to charitable uses, provided it be to be continued as a personalty, and the *executors or trustees are not obliged or under a necessity* of laying it out in land, by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will fall within the restraint and prohibition of the statute. In the first words, they do fall within them, for the testator directs that his executors shall *settle and assure, by purchase of lands of inheritance*: and if he had rested upon such first words, the devise had been clearly void; but then he goes on in the disjunctive, *or otherwise as my executors shall be advised*: and if a devise in a will is in the disjunctive, and leaves the executors two methods to do a particular thing, the one lawful, the other

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(t) 9 Mod. 221; August 6th, 1740, Highm. 174.

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prohibited by law, can any Court say, because one method is unlawful therefore the other is so, and the whole bequest is void? No, for if one bequest is lawful, that shall be pursued and take effect. I am of opinion upon the whole, that there is nothing that makes this bequest void in every point, but that it is good in that way which the law does not forbid. But I would not have it questioned, if a man should by his will direct a sum of money to be laid out in land, or upon rent-charge to be secured upon land for any charity, and, in the meantime, till it can be laid out, to be invested in government securities, for the benefit of the charity, but that that bequest will be void; because the final end and intention of such testator was, to dispose of his money in land, and the investiture of it in government and personal securities was but to secure it till a proper purchase of lands or rent-charge offered. As to the annuity of 5*l*., there are fewer objections to that than to the other, for there is no direction at all for any money or personal estate to be laid out in land, for the executors are only willed to secure and settle 5*l*. a year for the purpose there mentioned; and it must be secured upon a personal fund, consistent with the will and intention of the testator, and not contradictory to the words of the Act of Parliament: It is often said in old books by the Judges, that "I was by at the making of the Act of Parliament, and the meaning and intention of it was then said to be this or that;" so I was by at the making of this statute, and it was at that very time said by the legislators, that it would not hinder any charitable distribution of personal estate." His Lordship accordingly decreed that the devise was good, and that the money should be invested in *South Sea* stock, for the charitable purposes mentioned in the will.

So in the case of *Grimmett v. Grimmett* (*u*), *William Grimmett* devised to his brother *J. Grimmett* 20*l*. a year for life, to be paid half-yearly, out of the interest money in the public funds, or mortgages, or any his real or personal estates of which he should stand invested; and gave the residue of his real and personal estates to his wife for life, and to dispose of at her death; and then directed the remainder of his estate after his wife's death to be divided into twenty-four parts; nineteen of which he disposed of: and by codicil directed the remaining five twenty-fourths, after the death of his wife, and payment of his debts and legacies, and also 20*l*. a year after the death of his brother, to be applied in clothing and educating twenty poor boys, sons of parishioners

(*u*) Amb. 210.

of *Brighthelmstone* in *Sussex*, in the principles of the Protestant religion, agreeably to the national and Established Church of *England*, and in reading, writing, arithmetic, merchants' accounts, and navigation; none to be admitted after eight, or continue after fifteen. And his will and pleasure was expressed to be, that the five twenty-fourths of his estate, after his debts and legacies paid, together with the 20*l.* a year after the death of his brother, or which should be deemed as an equivalent to the 20*l.* a year (570*l.* to be invested in some of the public funds, where there was a parliamentary security), to stand in the name of trustees, until the whole could be laid out in the purchase of land *to the satisfaction* of the governors and trustees (whom he appointed), which lands were directed to be purchased in the names of the trustees to the uses aforesaid: *viz.* the interest, profits and rents of the five twenty-fourths of his estate, together with the interest, profits and rents of the said 570*l.* after the death of his mother, or the lands which should be purchased therewith, should be applied annually for ever in clothing and educating twenty poor boys as aforesaid. The testator left no real estate. Lord *Hardwicke*, C., in giving judgment, said, "This is not a clear case. The question is, if this is a good and valid disposition of the 570*l.* and five twenty-fourths of the remainder of the testator's estate, or void by the Statute of Mortmain? I think it would be a hard construction to say such a charitable bequest is void by the statute. If a person directs money to be laid out in lands for a charitable use, it would be void, although the Court would order the money to be placed in the funds till the purchase is made. So, where a man gives it in such a manner, that the land to be purchased is the final end and thing given. But where there is sufficient room for the Court to say, there is a *discretionary* power in the trustees to lay the money out one way or other, either in the funds or in lands, I have determined such a devise to be good, as in *Sorresby v. Hollins* (*v*), and *Grayson v. Atkinson*, 7th November, 1752 (*w*). I am of opinion there is room to construe this bequest with such latitude. I do not lay any weight on the directions to place the money in the funds in the first place; for that would be to make the validity of a will to depend upon the order of the words. The direction is to place the money in the funds, until laid out in lands to the satisfaction of the trustees. When can that be? Not while the statute is in

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(*v*) *Supra*, p. 1149.

Widmore v. Woodroffe, Amb. 636;

(*w*) See observations upon it in 1 Bro. C. C. 13, note.

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force. Suppose it had been, till by law it may be, such bequest would be good. Those words must mean, when the trustees approve of laying it out; that cannot be while the Statute of Mortmain is in force; it would be to act contrary to their trust. It was said, the rule of construction as to a devise of money to be laid out in lands, is the same now as it was before the Statute of Mortmain. That is true. But suppose the trustees in this case would not act, the trust would devolve on the Court, and I would order the money to be placed in the funds, and not invested in lands."

In the case of the *Attorney General v. Goddard* (x), the testator bequeathed 1,000*l.* *India* annuities to trustees upon trust to pay the interest to the officiating minister for the time being of a certain chapel, and in conclusion added, "Lastly, as money is of more uncertain value than land, I do also give them (meaning the trustees) power to make such purchase as they shall think best for perpetuating the gift." A question arose, whether this clause did not bring the gifts within the Mortmain Acts, and Sir *Thomas Plumer*, M. R., considering the leaning of the Court in favour of charities, was of opinion that the bequest was good, as not amounting to a direction to the trustees to purchase, but merely giving them a discretion.

2. Land, or
money to be
laid out in land,
for the benefit
of Queen
Ann's bounty.

2. The *next* exception out of the act of 9 *Geo.* 2, c. 36, is that of a devise of real estate, or money to be laid out in real estate, for the benefit of Queen *Ann's* bounty, and which is by virtue of a special enactment in the 43 *Geo.* 3, c. 107.

Before the passing of the latter act, such testamentary gifts were deemed within the operation of 9 *Geo.* 2, c. 36.

Thus, in the case of *Widmore v. Woodroffe* (y), *Richard Widmore*, by will, in 1764, gave to the corporation of Queen *Ann's* bounty the sum of 100*l.* of lawful money of *Great Britain*, to augment some poor vicarage in the county of *Bucks* or *Southampton*. The question was, whether the legacy was within the Statute of Mortmain, as the governors were bound by certain rules made by them, and confirmed by the King under the great seal to lay it out in the purchase of land: and an additional question arose, whether the Crown, under the reservation in the charter, might not make a new law to enable the corporation to

(x) 1 *Turn. & Russ.* 348; see *Johnston v. Swann*, 3 *Mad.* 457, *infra*.

(y) *Amb.* 636; 1 *Bro. C. C.* 13,

take legacies without being bound to lay them out in land; and if such new law were made, whether it would not extend to this case. Upon the main question, the Chancellor expressed his clear opinion that the legacy could not be supported, because it must of necessity be laid out in land; and observed, that the charter of rules confirmed by the Crown reserved power to alter, vary, and make new laws; but that those rules were in force until altered; and, upon the second question, he said, he had no doubt the Crown might alter and make new laws, but they could not have a retrospect; the legacy must vest at the death of the testator, or be void at the time, and the right vests in another.

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Land or money to Queen Ann's bounty.

So again, in *Middleton v. Clitherow* (z), *John Taylor*, after bequeathing several annuities, and some charitable legacies, and appointing the plaintiff residuary legatee, gave the annuities, upon the death of the annuitants, to the society for increasing clergymen's livings in *England* and *Wales*, "for the perpetual purpose of increasing their livings." It appeared from the Master's report, that the principal fund for increasing small livings was that usually called *Queen Ann's bounty*, which was for the augmentation of the maintenance of poor clergy; and that there were two other charities for the augmentation of small livings, supported by estates in the counties of *Somerset* and *Devon*, the one under the will of *Mrs. Pyncombe*, to enable poor clergy in general to apply for assistance from *Queen Ann's bounty*; and the other was secured by estates devised by *Mrs. Home* for the benefit of poor vicars in the counties of *Cornwall*, *Devon*, *Somerset*, and *Dorset*, applying for assistance from the said funds; and that there were no other charities for increasing clergymen's livings: it was insisted for the plaintiff, the residuary legatee, that the bequest was void; there being no society that answered the description, but the governors of *Queen Ann's bounty*; and it had been repeatedly determined, that bequests to them were void under the Statute of Mortmain; because all their funds were laid out in the purchase of estates. The Lord Chancellor said, the two other charities could not possibly meet the description in the will; and declared the legacy void.

But the law, as settled in the two preceding cases, is now altered, and the statute of 2 & 3 of *Ann*, c. 11, to the extent in which it is recited, is now revived by the 43 *Geo.* 3, c. 107. The latter statute begins by reciting the statute of *Ann*, and the statute

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of 9 Geo. 2, thus: Whereas *by an Act, made in the second and third years of the reign of her late Majesty Queen Ann, intituled, "An Act for making more effectual her Majesty's gracious intentions for the augmentation of the maintenance of the poor clergy, by enabling her Majesty to grant in perpetuity, the revenues of the first fruits and tenths; and also for enabling any other persons to make grants, for the same purpose;"* after reciting, amongst other things, that for the encouragement of such well disposed persons as should, by her Majesty's royal example, be moved to contribute to so pious and charitable a purpose, and that such their charity might be rightly applied, it was amongst other things enacted, that all and every person and persons having in his or their own right any estate or interest, in possession, reversion, or contingency, of or in any lands, tenements, or hereditaments, or any property of or in any goods or chattels, should have full power, license, and authority, at his, her, or their will and pleasure, by deed enrolled in such manner and within such time as is directed by the statute made in the twenty-seventh year of the reign of King Henry the Eighth, for enrolment of bargains and sales, or by his, her, or their last will or testament in writing, duly executed according to law, to give and grant to and vest in the corporation thereby authorized, and since erected under the name of The Governors of the Bounty of Queen Anne, and their successors, all such his, her, or their estate, interest, or property in such lands, tenements, and hereditaments, goods and chattels, or any part or parts thereof, for and towards the augmentation of the maintenance of such ministers officiating in such church or chapel where the liturgy and rites of the said church were or should be so used or observed, as in the said Act were mentioned, and having no settled competent provision belonging to the same, and to be for that purpose applied according to the will of the said benefactor, in and by such deed enrolled, or by such will or testament executed as aforesaid expressed, and in default of such direction, limitation, or appointment, in such manner as by her Majesty's letters patent should be directed or appointed as aforesaid, and such corporation and their successors, should have full capacity and ability to purchase, receive, take, hold, and enjoy for the purposes aforesaid, from such persons as should be so charitably disposed to give the same, any manors, lands, tenements, goods or chattels, without any license of writ of ad quod damnum, the Statute of Mortmain, or any other statute or law to the contrary notwithstanding: and it was by the same Act provided, that that Act, or anything therein contained, shall not extend to enable any person or persons being within age, or of nonsane memory, or women covert without their husbands, to

make any such gifts, grant, or alienation; anything in that Act contained in anywise notwithstanding: and whereas the beneficial effect and operation of the said Act have been considerably obstructed and retarded by an Act passed in the ninth year of the reign of his late Majesty King George the Second, intituled, "An Act to restrain the disposition of lands, whereby the same become unalienable:" the act of 43 Geo. 3, then proceeds to enact, "For remedy thereof, be it enacted, &c., that so much of the said Act of her late Majesty Queen Anne, as is herein recited, shall be and remain in full force and effect, the said Act of his late Majesty King George the Second, or any other act or law to the contrary notwithstanding."

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By the statute of 45 Geo. 3, c. 84, s. 3, it was enacted, in order to facilitate the intention of all such persons as may be disposed to contribute to the augmentation of such livings and curacies as are within the meaning of the laws now in force respecting Queen Anne's bounty; that it shall be lawful for any person or persons having in his, her, or their own right, any money, goods, chattels, or other personal effects, at his, her, or their will and pleasure, to give or grant to, or invest in the said governors of the bounty of Queen Anne, and their successors, to be by them disposed of according to law, all or any part of such money, goods, chattels, or other personal effects, without any deed or deeds, either enrolled or not enrolled, in like manner as he, she, or they could or might have done, either by deed or deeds enrolled or otherwise, before the passing of this act; any statute or law to the contrary in anywise notwithstanding: Provided nevertheless, that nothing herein contained shall in any manner alter or affect the law now in force respecting the gift or conveyance of any lands, tenements, or hereditaments, by any deed or deeds, or the disposition thereof, or of any goods, chattels, or other personal property, by will or testament.

3.—A further exception is made out of the statute of 9 Geo. 2, c. 36, by the statute 43 Geo. 3, c. 108, for the purpose of promoting the building, repairing and otherwise providing of churches and chapels, and of houses for the residence of ministers, and the providing of churchyards and glebes (a). The latter statute, after reciting as follows: *Whereas a sufficient number of churches and chapels for the celebration of divine service, according to the rights and ceremonies of the United Church of England and Ireland, and of mansion houses with competent glebes for the residence of*

3. Devises and bequests for promoting the building, &c. of churches, &c.

(a) See also 58 Geo. 3, c. 45, s. 34; 3 Geo. 4, ^{c. 72}s. 1; 5 Geo. 4, c. 103, s. 19.

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*ministers officiating in such churches and chapels, is necessary towards the promoting of religion and morality: and whereas the same are either wholly wanting, or materially deficient in many parts of England and Ireland: And whereas many well disposed persons would be desirous of contributing towards the supply of such defects, if they were enabled so to do in the manner herein- after directed, "enacted," That all and every person and persons, having in his or their own right, any estate or interest in possession, reversion or contingency, of or in any lands or tenements, or of any property of, or in, any goods or chattels, shall have full power, license, and authority, at his and their will and pleasure, by deed enrolled in such manner, and within such time, as is directed in *England* by the statute made in the twenty-seventh year of the reign of King *Henry* the Eighth, and in *Ireland* by the statute made in the tenth year of the reign of King *Charles* the First, for enrolment of bargains and sales, or by his, her, or their last will or testament in writing duly executed according to law, such deed, or such will or testament being duly executed three calendar months at least before the death of such grantor or testator, including the days of the execution and death, to give and grant to and invest in any person or persons, or body politic or corporate, and their heirs and successors respectively, all such his, her or their estate, interest or property in such lands or tenements, not exceeding *five acres*, or goods and chattels, or any part or parts thereof, not exceeding in value *five hundred pounds*, for or towards the erecting, rebuilding, repairing, purchasing, or providing any church or chapel where the liturgy and rites of the said United Church are or shall be used or observed, or any mansion house for the residence of any minister of the said United Church officiating, or to officiate in any such church or chapel, or of any outbuildings, offices, churchyard, or glebe, for the same respectively, and to be for those purposes applied, according to the will of the said benefactor, in and by such deed enrolled, or by such will or testament, executed as aforesaid expressed, the consent and approbation of the ordinary being first obtained, and in default of such direction, limitation or appointment, in such manner as shall be directed and appointed by the patron and ordinary, with the consent and approbation of the parson, vicar, or other incumbent; and such person and persons, bodies politic and corporate, and their heirs and successors respectively, shall have full capacity and ability to purchase, receive, take, hold, and enjoy for the purposes aforesaid, as well from such persons as shall be so charitably disposed to give the same, as from all other persons, as shall be willing to sell*

or alien to such person or persons, bodies politic or corporate, any lands or tenements, goods or chattels, without any license or writ of *ad quod damnum*, the Statute of Mortmain, or any other statute or law to the contrary notwithstanding: provided always, that this act or any thing herein contained, shall not extend to enable any person or persons within age, or of nonsane memory, nor women covert without their husbands, to make any such gift, grant or alienation; anything in this act contained to the contrary in anywise notwithstanding."

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The act then declares, that any gift, exceeding five acres, or 500*l.*, is to be reduced by order of the Chancellor on petition: and that no glebe containing upwards of fifty acres, shall be augmented by more than one acre.

In a recent case, *Dr. Ireland*, Dean of *Westminster*, by his will dated *January*, 1842, bequeathed all his three per cent. Bank annuities, to his executors upon trust to pay 5,000*l.* part thereof to the manager or trustees for the time being of the Metropolis Church Building Fund, to be laid out in building a chapel in some convenient part of *Westminster*, under the direction of the Bishop of *London*, to whom the testator had spoken on the subject. The bequest being void under the Statute of Mortmain, the executors of *Dr. Ireland* presented a petition under the 43 Geo. 3, c. 108, praying that the above bequest might be reduced to 500*l.*, and that they might pay the sum to the trustees of the fund, deducting legacy duty. Lord *Lyndhurst*, C., made an order as prayed (*a*).

4. A further exception occurs by the custom of *London*, in the case of a devise by a freeman of *London*, of land within the city, and which is not affected by the statute of 9 Geo. 2 (*b*). This was recognised in the case of *Middleton v. Cator* (*c*). In that case *John Cator*, a freeman of *London*, being seised of a messuage in *Water Lane*, *Fleet-street*, and other real and personal estate, by will, duly attested, devised to the defendants all his real and personal estate, in trust, after the death of his wife, to sell the same; and, in case the residue of his estate should amount to 1,000*l.*, he directed his executors to pay it into the hands of the master or senior warden, and the rest of the wardens of the Fishmongers' Company, *London*, to be laid out in land, and the rents and produce thereof to be for ever applied in augmenting the

4. Devises by freemen, according to custom of *London*.

(*a*) *In re Dr. Ireland's Will*, 12 Law J., N. S. (Ch.), 381.

(*b*) 1 Bac. Abr. Title Customs of *London*.

(*c*) 4 Bro. C. C. 409.

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weekly allowance to the poor of the hospital, called *Jesus Hospital*, at *Bray*, in the county of *Bucks*: and if his residue should be larger, he directed a larger proportion to be paid to the said purpose. One of the questions was, whether such bequest to the Fishmongers' Company was void by the Mortmain Act. It was insisted that the testator, being a freeman of *London*, might devise in mortmain, according to the custom recognised, 1 Bro. Abr. 556: and the Lord Chancellor decided, that the custom clearly must be confined to lands in the city of *London*, which *Water Lane* was not, and it could not extend to a will of lands in *Yorkshire*.

5. Devises of real estate or money to be realized for the benefit of the universities, &c.

5. A further exception, by the express words of the Act of 9 Geo. 2 (*d*), is made in the case of dispositions of real estate, or money to be laid out in real estate, for the benefit of the universities, or for the colleges of *Eton*, *Winchester*, or *Westminster*. The Act provides that it "shall not extend or be construed to extend, to make the dispositions of any lands, tenements, or hereditaments, or of any personal estate to be laid out in the purchase of any lands, tenements, or hereditaments, which shall be made in any other manner or form than by this Act is directed, to or in trust for either of the two universities within that part of *Great Britain* called *England*, or any of the colleges or houses of learning within either of the said universities, or to or in trust for the colleges of *Eton*, *Winchester*, or *Westminster*, or any or either of them, for the better support and maintenance of the scholars only upon the foundations of the said colleges of *Eton*, *Winchester*, and *Westminster*." The 5th section enacts, that "no college is to hold more advowsons, than shall be equal to one moiety of their fellows, &c.;" but that is repealed by 45 Geo. 3, c. 101.

The cases cited below (*e*), and stated in a subsequent part of this chapter, are instances of such exception; and to which may be added the case of *Attorney General v. Tancred* (*f*). In that case, *Christopher Tancred*, Esq., devised his real estate, except a house at *Newmarket*, to trustees, to pay the rents, &c. annually to the thirteen fellows of *Christ's*, and the fellows of *Gonville*, and *Caius*, and the scholars of both the said colleges, living at his death; each fellow to have a double proportion to each

(*d*) Sect. 4.

(*e*) *Att. Gen. v. Andrew*, 3 Ves. 641, *infra*; *Att. Gen. v. Bowyer*, Ib. 725, *infra*.

(*f*) 1 Eden, 10, and see *Whor-*

wood v. University College, 1 Ves. sen. 537; also *Emanuel College, Cambridge, v. Bishop of Norwich*, 4 Bro. C. C. 482.

scholar. He then devised the house at *Newmarket* to the masters and fellows of *Christ's*, in trust that they and their successors should apply the yearly rents for some undergraduate student. It was contended that the devise to the fellows and scholars was void as made to them in their natural capacity, and that the exception in the statute extended only to devises to the general use of the universities and colleges, but not to the particular members of either of the universities and colleges. But it was decided by the Lord Keeper; 1st, that the devise was for the benefit of the whole body; and, 2ndly, that had it not been so, he should still have thought that the Legislature intended, by the exception in the statute, to save a devise for the benefit of particular members, as well as the whole body. And he further added, that the Legislature meant to except such devises as were really and *bonâ fide* for the benefit of colleges; not those in which legal interest only passed to the college, in trust for other charitable uses; for then the Statute of Mortmain might be defeated every day.

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The last observation is corroborated by the case of *Attorney General v. Munby (g)*. In that case, the Reverend *John Pigott*, rector of *Gilling East*, by indenture, dated the 15th of *July*, 1811, assigned certain leasehold premises in the *Cathedral Close, York*, held under renewable lease, and the furniture in the house there and in another house, to the master and fellows of *Trinity College, Cambridge*, and their successors upon trust, to permit the rector of *Gilling* for the time being to occupy the premises, and enjoy the use of the furniture during incumbency, he paying the rent and fines of renewal. By a second deed, dated the 14th of *October*, 1811, he assigned to the said master, fellows and scholars, mortgages to the amount of 3,000*l.* upon trust to permit the same rector of *Gilling* to receive the interest of the money, so long as it should remain on these mortgages, and after it should have been called in, and invested on other securities: both which deeds were duly enrolled, according to the Act. By his will, dated in 1812, the testator devised the advowson of the rectory of *Gilling*, to the said master and fellows absolutely. Then reciting that he had by deed of gift given to the said society in trust the sum of 6,000*l.*, he directed the interest of that sum to be applied, in the first place, in building an addition of two rooms to the rectory house, and afterwards to the use of the incumbent for the time

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being; and lastly, noticing that he had as yet only transferred 3,000*l.* of that 6,000*l.*, gave the remaining 3,000*l.*, in case he should die before it was transferred to the said master and fellows upon the trusts of the former 3,000*l.* The testator did not live to the end of the twelvemonth after the execution of the second deed, as the Act requires. It was contended, on the part of the defendant, the residuary legatee and executor, that the gift was void under the Act, because the grantor, being himself the rector of *Gilling*, derived a benefit from his own grant. But Sir *William Grant*, M. R., decided in the negative, observing, that the deed did not contain any such reservation, but that the gift took effect immediately in possession. That with regard to the personal chattels, the legal interest passed to the college; and he knew of no objection to the college taking subject to such trust. The second deed was admitted to be void, by the death of the grantor within the twelvemonth. But it was attempted, on the part of the plaintiffs, to set it up by the operation of the will, which had given the advowson of the rectory; and that the deed, assigning property in augmentation of that advowson, was in fact a deed for the benefit of the college, and therefore within the exception of the Act. But Sir *William Grant* determined that they could not be thus connected, so as to make the one operate upon the other, by way of relation. That they must be taken as they stood singly; and then the deed, being a gift not *beneficially* to the college, but to the college *in trust* for another object not within the exception of the statute, must necessarily fail by the death of the grantor before the completion of the period assigned by the statute. It was also contended by the plaintiffs, that the whole 6,000*l.* was given; *viz.*, 3,000*l.* on mortgage, by virtue of the recital of the prior intended grant; and the other, by direct disposition. But this construction was denied by the Master of the Rolls, who said there was no mistake or misapprehension on the part of the testator; the point did not arise, upon which the Court, in other cases, had construed a recital in a will as equivalent to an express gift; that the will was good as a gift of the 3,000*l.* originally bestowed by it; but had no effect upon the former gift, which must fail for the reason before given.

A further objection was made in the preceding case, and is noticed here for convenience, though the point will more properly come into consideration in a subsequent part of the present section, wherein the class of cases, to which it belongs, will be discussed. The objection was not to the gift of the 6,000*l.* by the will, but

to the purpose for which it was to be applied; viz., the building of two additional rooms to the rectory house; and his Honor said, it was clear, on the authority of the cases, that such a purpose is consistent with law, no additional land being put into mortmain: and it was accordingly so decided in the case of *Attorney General v. Parsons* (h), where the bequest was equivocal, because it might have signified an addition to the land, as well as to the buildings already erected; yet the Court held that so far as it applied to the latter object merely, it was effectual.

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6. Another exception is made by the express words of the Act (i), in regard to dispositions of real estate in *Scotland*. The Act provides, in the sixth section, "That nothing therein contained shall extend to the disposition, grant or settlement of any estate, real or personal, lying or being within that part of *Great Britain* called *Scotland*."

6. Real and personal estate in *Scotland*. Heritable securities and money derived from *England* to be laid out in *Scotland*.

Heritable securities have been decided to be within the above provision.

Thus, in the case of *Oliphant v. Hendrie* (j), a testator bequeathed the sum of 400*l.* to a religious society in *Scotland*, to be laid out in the purchase of heritable securities in *Scotland*, and the interest thereof to be applied towards the education of twelve poor children, and towards increasing the allowance of the schoolmaster of the parish. It was contended the bequest was avoided by the Statute of Mortmain, as being analogous to land, and a bond that would descend to the heir of the obligee. But Lord *Thurlow*, C., held it to be a good bequest; and declared that it ought to be paid as one of the general legacies.

The same point is established in *Mackintosh v. Townsend* (k). In that case, by virtue of a will of *William Mackintosh*, dated in 1797, and of two codicils, two sums of 5,000*l.* were given to the magistrates of *Inverness* for the time being, to be invested as soon as expedient, in lands in the county, and the interest to be appropriated for the education of five boys in succession to be selected from the descendants of certain families named. The question was, whether the legacy was void by the Statute of Mortmain, or within the exception before stated, as being not real or personal estate in *Scotland*, but personal estate derived from *England* to be invested in land in *Scotland*. But Lord *Eldon* decided, that the bequest was within the exception; observing, "Upon

(h) 8 Ves. 186.

(i) 9 Geo. 2, c. 36.

(j) 1 Bro. C. C. 570.

(k) 16 Ves. 330.

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examining the case of *Oliphant v. Hendrie*, in the Register's book, there appears to be nothing special in it. The testator gave a sum of money, to be laid out in heritable securities in *Scotland*, for charitable purposes; and Lord *Thurlow*'s decree was that the legacy was good. This is a direct decision upon the point, and if I had more doubt upon it, that authority binds me to determine, that it is a good bequest."

But where the testator directs lands to be purchased generally, and does not confine the purchase to lands in *Scotland*, or leave such purchase at the discretion of his trustees there, although the charitable purpose is exclusively for objects in *Scotland*, the general direction to purchase brings it within the Mortmain Act, the testator not manifesting any intention that the purchase should be of land in *Scotland*.

This occurred in *Attorney General v. Mill* (1), wherein the testator, a native of *Montrose*, when attacked by sudden illness on a journey to *London*, made a will in the *English* form, whereby he gave all his residuary real and personal estate to four trustees, upon trust to invest such part of his estate as should not consist of real estate in the purchase of lands or rents of inheritance in fee simple; such purchases to be made in the names of his trustees or the survivors or survivor of them; and by them, in due and legal form, conveyed from time to time with such parts of his real estate, as might not be disposed of for the purposes of his will, to other trustees and their heirs, so as to preserve a perpetual succession for the purposes mentioned in a certain instrument executed by the testator of even date with his will. The object of the instrument referred to, and which was executed by the testator and attested by two witnesses, was, that the trustees of his will should pay from time to time the yearly rents of his estates to trustees named in the deed, some of whom were not trustees in the will, to be applied by the latter trustees towards the relief and comfort of indigent ladies residing in *Montrose*. The deed also provided, that the trustees thereof should reside at or within twenty miles of *Montrose*. By a third codicil, the testator mentioning the death of one of his executors and trustees, gave and bequeathed all the residue of his personal estate, not before bequeathed by his will and former codicils, to *John Mill* and *George Gavin Brown*, equally; and appointed them executors, confirming the appointment in his will of his surviving trustees therein named. Lord *Lyndhurst*, C., decided that the bequest

(1) 3 Russ. 328.

was within the Mortmain Act, observing, "If it was the intention of the testator to give the trustees power to lay out the residue of his personal estate in the purchase of lands either in *Scotland* or *England*, the gift to charity will be good; and it is perfectly clear that it is not necessary that the testator should have expressed, in positive and distinct terms, that the trustees were to have that option. If I could collect from any part of the will that it was his meaning or in his contemplation, that his trustees should have an option of buying lands and rents of inheritance, either in *Scotland* or in *England*, I should give effect to his intention."

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7. The act under consideration is local, and therefore does not extend to dispositions of real estate in *Ireland*, as stated by Lord *Loughborough* in *Campbell v. Lord Radnor* (*m*), and which form a further exception. But, though bequests of personal estates derived from *England* to be laid out in lands in *Scotland* or *Ireland* for charitable uses, are within the above exceptions of the act, yet bequests of the produce of real estate in *England* for those purposes are within the general operation of the act, and void. This was settled in the case of *Curtis v. Hutton* (*n*), the facts of which are stated in a former chapter (*o*), and to which the reader is referred. The judgment of the Master of the Rolls, so far as relates to the present point, was as follows: "The statute (*p*) contains no express words prohibiting a bequest of money, to be produced by the sale of land, for charitable purposes; but it is settled by construction, that such a bequest is within the spirit and meaning of the law; and it is clear, that no charity in *England*, not within the exception of the statute, could have derived any benefit from the produce of the real estate. The question then is, whether such produce may be given to what in contemplation of the *English* law is for a charitable purpose; when that purpose is to be carried into execution in another country. The validity of every disposition of real estate must depend upon the law of the country in which that estate is situated. The subject of this statute is real estate in *England*. The owners of such property are disabled from disposing of it to any charitable use, except by deed, executed twelve months before the death of the owner, &c., to take effect from the execution. The words are perfectly general, 'any charitable use

7. Real estate in Ireland.

(*m*) 1 Bro. C. C. 271.

(*n*) 14 Ves. 537.

(*o*) Ch. 15, p. 988.

(*p*) 9 Geo. 2, c. 36.

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whatsoever;’ and the object could not be to treat *English* charities less favourably than charities to take effect for the benefit of other countries. It would be somewhat incongruous to refuse to permit such a disposition for the most laudable and meritorious charitable institution in *England*; but if the party chose to carry this benevolent intention beyond *England*, to permit him to do so, to the effect of disinheriting his heirs in his last moments. The disinheriting of the lawful heirs by languishing or dying persons, which is treated by the statute as a mischief, cannot be less so, when the effect is to carry the property out of *England*. Therefore, neither the words of this statute, nor the presumable intention, warrant me in declaring, that it is to be confined to charitable purposes to be carried into execution in *England*. The statute not containing an exception in favour of the universities of *Scotland*, as it does with regard to the universities of *England*, I must consider this as a charitable disposition, by which nothing that is the produce of the testator’s real estate can pass.”

8. Real estate
in the West
Indies and
other colonies.

8. Dispositions of real estate in the *West Indies*, or the other colonies, form a further exception. This appears from the case of *Attorney General v. Stewart (q)*. In that case, *James Wilson*, by will dated in 1799, directed his executors to dispose of all his property (consisting of real and personal estate) at *Grenada*, the produce to be remitted to the magistrates of *Banff*, in *North Britain*, to be laid out by them as a charitable fund in the best manner possible, and to remain under the directions of the acting magistrates from year to year. Upon the question, whether the Statute of Mortmain was in force in the Island of *Grenada*, on an exception to the Master’s report, who had stated, after some doubt, his opinion in the affirmative; Sir *William Grant*, M. R., said, that it depended on the consideration, whether it be a law of local policy, adapted solely to the country in which it was made, or a general regulation of property, equally applicable to any country, in which it is by the rules of the *English* law that property is governed. He conceived that the object of the Statute of Mortmain was wholly political, that it grew out of local circumstances, and was meant to have merely a local operation: and at the close of his very luminous judgment, observed, “Framed as the Mortmain Act is, I think it quite inapplicable to *Grenada* or to any other colony. In its causes, its objects, its provisions, its qualifications, and its exceptions, it is a law wholly

English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred as it stands into the code of any other country. I am of opinion, therefore, that it constitutes no part of the law of the Island of *Grenada*, and that the exception must consequently be allowed."

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In *Mitford v. Reynolds* (r) the testator gave the remainder of his property to the government of *Bengal*, to be applied to charitable, beneficial, and public works, at and in the city of *Dacca* in *Bengal*, for the exclusive benefit of the native inhabitants, in such manner as they and the government might regard as most conducive to that end. Lord *Cottenham*, C., after observing, that he collected the meaning of the testator to be, that something should be constructed or established for the benefit of the native inhabitants of *Dacca*, held the bequest valid, observing, that it was unnecessary for him to advert to the question as to the Statute of Mortmain, because he agreed in what was stated in the case of *The Mayor of Lyons v. The East India Company* (s).

9. A further exception out of the operation of the statute is made in favour of bequests of money, to be applied simply in the melioration of lands in mortmain, or for building upon them: and the reason is, that such dispositions are not within the intent and meaning of the statute, the object of which is to prevent any addition to the quantity of land already in mortmain, and not to impede their melioration or improvement. Thus, in the case of *Glubb v. Attorney General* (t), wherein *Thomas Munday* bequeathed 400*l.* and 100*l.* to trustees, to be laid out in building a parsonage house on the glebe of *Bickton*. On a bill filed by the rector to have the money laid out, the question arose whether the devise was void as within the Statute of Mortmain? and Sir *Thomas Clarke*, M. R., determined that it was not. The statute, he said, was intended to prevent new acquisitions in mortmain, and that erecting or building was not to be considered as such. Had the testator not made the devise in question, he might have been sued for dilapidations, and the money recovered would have been laid out upon the building; and he decreed the money to be laid out.

9. Money to be applied in melioration of lands in mortmain.

(r) 1 Phil. 185, 192.

Stewart, 2 Mer. 161, per M. R.

(s) 1 Moore's Privy Counc. Ca.

(t) Amb. 373.

175, 276, &c.; see also *Att. Gen. v.*

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Again, in the case of *Harris v. Barnes* (*u*), Doctor *Conings* bequeathed 200*l.* to the defendant *Stone*, to be laid out in repairing the free chapel of *Grendon Court*, part of his estate: and the Lord Chancellor was clearly of opinion, that the legacy was not within the letter or meaning of the Statute of Mortmain; the words of which were, “to be laid out in purchase of lands, &c. ;” and the meaning and intention of which were, to prevent the *increase* of lands, in mortmain, beyond what was so at the time the act was made. That the legacy was only to support that which was in mortmain at the time of the will.

Again, in *Brodie v. Duke of Chandos* (*v*), *Ann Thistlewaite* bequeathed to trustees all her ready money, subject to debts, to lay it out in the erecting and new building of a neat parsonage house, “which, her will was, should be erected at the upper end of the garden belonging to the said parsonage house,” to be enjoyed by the then present and other future incumbents. The question was, whether the bequest was within the meaning of the statute; and the Lord Chancellor decreed in favour of the charity, as no land was to be purchased.

So, in *Attorney General v. Bishop of Chester* (*w*), Archbishop *Secker* bequeathed 1,000*l.* to be laid out upon repairing parsonage houses; and Lord *Thurlow*, C., directed a reference to the Master, that proposals of proper objects might be laid before him.

So also, in the case of *Attorney General v. Parsons* (*x*), *Edward Tawney*, by indenture of bargain and sale, duly executed and inrolled, conveyed to the mayor, bailiffs, &c., of the city of *Oxford*, two freehold messuages, &c., in the suburbs of the said city, in trust, to permit three poor men and three poor women to be nominated by him during life, and after his death by such person or persons in such manner, &c., as he had, or should, by any deed in writing, or by his will or codicil, appoint. By his will he gave to the mayor, &c., 4,000*l.* three *per cent.* consols, upon trust to pay the dividends as follows; 20*l.* a year each, by equal half-yearly payments, to three poor men and three poor women of the city of *Oxford*, or the suburbs thereof, for ever, for their lives; and subject thereto, in trust to lay out, as occasion should require, the remainder of the dividends, at such times and in such manner as his trustees should direct, in rebuilding, repairing, altering or adding to and improving, the messuages or

(*u*) Amb. 651.

(*v*) 1 Bro. C. C. 444, note.

(*w*) 1 Bro. C. C. 444.

(*x*) 8 Ves. 186.

tenements, ground and appurtenances, conveyed by him to the said mayor, &c., by bargain and sale inrolled, for the use and benefit of such poor men and women, who were to reside and live upon the premises. The information prayed that the plaintiffs, as trustees of the charitable institution, might be declared entitled to the 4,500*l.* stock, upon the trusts of the will, and that the executors might be decreed to transfer the stock, &c. Lord *Eldon*, C., said, "This bequest, according to the current of modern authorities, so far as it is to be understood not to direct purchases of land to be made, is good; but as far as the words, *adding to*, relate to some part of the context, it is not good; for it is not only adding to the messuages or tenements, which I may consider to be upon the ground already in mortmain, but it is 'adding to and improving the messuages or tenements, ground and appurtenances.' I agree with the late cases, which go a great way to establish, that the Court cannot put such a construction upon the word *erect*, as was put upon that word in former cases; and that *prima facie*, the testator must be taken to mean by that word, that land shall be bought. I think, the good sense is with the later cases; requiring, that the testator himself should have manifested his purpose to be sufficiently answered, if they could hire or beg land, according to the expressions in the different cases. In this case, it is clear the testator has adverted to land already in mortmain; adverting to his own deed."

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The decree was, "that the legacy of 4,500*l.* stock is good, so far as to the payment of 20*l.* a year each to three poor men and three poor women, according to the will; also, so far as the surplus is directed to be applied in rebuilding, repairing, altering or improving the messuages or tenements, grounds and appurtenances, and so far as the additions directed by the will shall be made upon the lands conveyed by the testator, for the better residence of such poor men and women: but that it is bad, so far as any additions are to be made to the ground by acquiring other land" (y).

In the recent case of *Ingleby v. Dobson* (z), the bequest was of 2,000*l.* in trust, for the purpose of rebuilding or enlarging an old school-house, then existing in the parish of *Stokesley*, or of building a new school-house in the same parish. The school-house had

(y) See also *Att. Gen. v. Munby*, stated *supra*, p. 1159, and see also *Att. Gen. v. Power*, 1 Bull & B. 154. (z) 4 Russ. 342.

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Instances not considered cases of amelioration.

been erected by subscription in 1734, two years before the 9 Geo. 2, c. 36, upon waste of the manor given by the then Lord, which had ever since been used as a school-house. The validity of the bequest turned upon the question, whether the land was in mortmain at the death of the testator. Sir *John Leach*, M. R., decided that it was.

In the above cases, it is to be noticed, that the legacies were given expressly with a view to ameliorate, or build upon lands already in mortmain: but Lord *Hardwicke* seems to have thought, that when the bequest was of money to be laid out in building or erecting a chapel or school, the legacy would be good, if a piece of ground already in mortmain, could be obtained by any means for the purpose.

Thus, in the case of *Attorney General v. Bowles (z)*, *William Bowles* bequeathed to trustees 500*l.*, to be raised out of his personal estate, upon trust to lay out part of it in erecting a small school-house, and a little house adjoining for the master to live in; the whole purchase and building not to exceed 200*l.*; the remaining 300*l.* to be laid out in the purchase of land, or in some real security for the maintenance of the master. It was contended, that *real security* meant, substantial, good, and effectual security, and therefore that it was not within the Statute of Mortmain: but Lord *Hardwicke*, C., was of a different opinion, and said, that he must take the word *real* in its known and legal acceptance, and could not annex a new idea to it; so that the legacy of 300*l.* was void. But that, as to the 200*l.* if the trustees could procure a piece of ground, by the gift or generosity of any person, and not by purchase, they might be at liberty to apply to the Court, to lay out that sum, in erecting a school-house thereon, when proposals could be laid before the Court; but not to be laid out in land to build upon: which proposals were to be within a certain period.

This opinion, however, of Lord *Hardwicke*, has been frequently overruled by the subsequent cases below stated; and the law of the Court, as at present settled, seems to be, that in order to effectuate the dispositions, the testator must *point out or ascertain the lands in mortmain*, upon which the buildings are to be erected.

Thus, in *Attorney General v. Hyde (a)*, *Mary Glover*, by her

(z) 2 Ves. 547.

(a) Ambl. 751; see also *Attorney*

General v. Tyndall, stated, *supra*, p. 981.

will, ordered 1,500*l*. to be laid out, under the direction of the minister and churchwardens of *Royston*, for the time being, for erecting a free-school at *Royston*, for twelve poor boys and twelve poor girls of the parish of *Royston*; and directed, that so soon as the same should be built, 2,000*l*. should be placed out at interest, and the interest applied for the maintenance of a schoolmaster and schoolmistress, and for teaching boys and girls to read, write, &c. The information stated, that there was a piece of vacant ground at *Royston* belonging to the parish, upon a part of which there was a school-house, and prayed to have the 1,500*l*. and 2,000*l*. laid out, according to the directions of the will: and the question was, whether the legacy of 1,500*l*. to be laid out in erecting a free-school, was within the Statute of Mortmain? Lord *Apsley*, C., said, "This case, taking in all its circumstances, is new; in respect there is a piece of waste ground which is said to belong to the parish, on which the school-house may be built. Lord *Hardwicke's* determination in *Attorney General v. Bowles* (b), was certainly overruled by Lord *Northington*, in *Attorney General v. Tyndall*, which latter determination has been followed by several others. Directions in a will to erect a school-house in general, import an intention to purchase; but where there is land already in mortmain, there is no room for such presumption. Devise of money to build or repair upon land, that is already dedicated to the same use, is not within the statute; that was the ground of the determination in *Brodie v. The Duke of Chandos* (c). Though it appears there is a vacant piece of ground in the parish, the will does not point at the piece of ground. The will does not say, "to repair or rebuild the school-house now standing on the piece of ground;" she meant to have a school-house of her own foundation; she had no right to say, that the school-house which is now standing should be henceforward considered as the foundation; and he dismissed the information.

Testamentary dispositions to charity not within the stat. of 9 Geo. 2, c. 36.

Money to be applied in meliorating land in mortmain, and cases considered as exceptions.

So, in *Pelham v. Anderson* (d), a testator directed his executors to build and erect a hospital, for which purpose he charged his personal estate with 2,000*l*.; the residue to the same uses as his real estate. The legacy of 2,000*l*. was declared void by the Statute of Mortmain.

So, in *Attorney General v. Nash* (e), *Catherine Nash*, being

(b) *Supra*, last page.

(c) *Supra*, p. 1166.

(d) 1 Bro. C. 444, note; 2 Eden, 296.

(e) 3 Bro. C. C. 588; see Lord *Eldon's* observations upon this case in the *Att. Gen. v. Parsons*, *sup.*, p. 1166.

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possessed of a considerable personal, but not seised of any real estate, by will dated 1783, after giving several legacies, gave the residue of her real and personal estate to trustees, upon trust, as soon as conveniently might be, after her decease, to cause to be erected and built within that part of the parish of *St. Peter*, within the borough of *Droitwich* and county of *Worcester*, a dwelling-house or tenement of such size or dimensions as they should see proper; and that the same when erected and built, should be by them appropriated for the use of a school-house, for educating, clothing, and maintaining such a number of poor boys and girls, parishioners, within the said parish, as her trustees and their heirs should see proper, and find the interest, produce, and profits of her said real and personal estate and effects, sufficient to support and maintain, according to the true intent and meaning of her will. She then gave several directions for the government of the school, and directed and empowered her said trustees, out of her real and personal estate, to purchase such spot of ground within the said parish of *St. Peter*, as they should see proper, for the purpose of erecting the said house or school. The trustees having bought a proper piece of ground with their own money, for the erection, which they offered as a *gift* to the charity, the information prayed an account of the testatrix's property, and that the charity might be carried into effect. But to so much of the bill as prayed that the charity might be carried into execution, one of the defendants demurred, and shewed for cause of demurrer, that the charitable legacies were void in law: and Lord *Thurlow*, C., allowed the demurrer.

So, in the case of *Foy v. Foy* (*f*), *Sydney Hollis Foy*, by will, dated 1783, gave 1,000*l.* towards the erection and endowment of a hospital in the county of *Dorset*. Lord *Kenyon*, then Master of the Rolls, observed, that if it were necessary to buy land, to build the hospital upon it, it must clearly be within the statute; but it might go in aid of the endowment of any hospital already existing. He therefore referred it to the Master to inquire whether there was any hospital existing in *Dorsetshire*. The next clause in the will was, "I give 800*l.* for the purpose of erecting and endowing a school." Upon these two clauses, the determinations were different; the former was referred to the Master, because the testator pointed to the hospital which was then erecting; but as to the latter, his Honor declared it

(*f*) Cited 3 Bro. C. C. 593.

void, and said, that he should also have declared the other void if there had not been an existing hospital.

So, in the case of *Chapman v. Brown* (g), *Elizabeth Brookes*, by her will, dated 1776, gave 5*l.* to each of her relations, if she should have any poor relations at her death, so far as the second degree, who would be said to be in want: and, after directing all her wearing apparel to be distributed among her poor relations, at the discretion of her executors, she gave the residue of her real and personal estate and effects to her executors, after payment of debts, funeral expenses, and legacies, for building or purchasing a chapel for the service of God: and she gave her two small silver waiters, her large silver cup, and her best damask table cloth, and two damask napkins, for the use of the communion table; and requested that her bureau bookcase, with all her books, might be deposited in the said chapel; and desired that the chapel might be where it should appear to her executors to be most wanted: and if any overplus remained, after purchasing or building the same, she requested that it might go towards the support of a faithful gospel minister, not to exceed 20*l.* a year; and if, after that, any overplus remained, she desired that it might be laid out in such charitable uses as her executors should think proper; and she appointed the plaintiff and another person (who renounced the executorship) executors. The bill prayed an execution of the trusts in the will. Sir *William Grant*, M. R., observed: "The only question is, with regard to the validity of the bequest for charitable purposes. It is contended for the heir-at-law, that as to the real estate, the devise is void; and that unquestionably is so. It is also clearly void as to the mortgage. By the next of kin it is contended, that the disposition is void, so far as it directs the residue to be laid out in building or purchasing a chapel: and it is contended by the Attorney General, on behalf of the charity, that being in the alternative, to build or purchase, if either of those purposes could legally be effected, the trust ought to be carried into execution; and that undoubtedly would be so. It is insisted, that the purpose to build a chapel upon ground already in mortmain, is legal; though to purchase ground for the purpose of building a chapel, is not legal. The *Attorney General v. Bowles* (h) was referred to as an authority, that if there is a bequest of money to be laid out in building a chapel or school, the intention is to be taken to be, to build, in case a piece of ground already in

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(g) 6 Ves. 404.

(h) *Supra*, p. 1168 of this volume.

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mortmain could be found for that purpose; and that case is undoubtedly an authority for that. But this case appears to have been overruled by a great number of subsequent decisions." His Honor, after discussing the case before stated, proceeded thus: "In this case, the alternative is to build or purchase. It is admitted, a bequest to purchase would be void; and it is determined by all those cases, that a bequest for the purpose of building a chapel is equally void. That bequest, therefore, falls to the ground. The next question arises upon the direction, that if any overplus remains, after the purchasing or building the chapel, it shall go towards the support of a faithful gospel minister, not exceeding 20*l.* a year. It is contended by the next of kin, that this is a bequest dependant upon the former; and that failing, this must likewise fail, upon the authority of the *Attorney General v. Goulding* (i). The late Master of the Rolls seemed to doubt a little the doctrine of that case, in the *Attorney General v. The Earl of Winchelsea* (j). But afterwards, in the *Attorney General v. Boulton* (k), he approved of that doctrine, and acted upon it. It is then contended, that this is not dependant upon the other purpose; but it is for the support of a minister generally, not at that chapel. I am clearly of opinion she must have meant a minister in that chapel which she intended to be purchased. It would be quite absurd to suppose she intended no provision for the minister of her own chapel; but that a provision should be made for the minister at some other chapel, to be built by a stranger. Therefore, upon the authority of the *Attorney General v. Goulding*, and the *Attorney General v. Boulton*, that bequest must fail, as the chapel is not to have existence."

So also, a bequest to individuals or a society not holding land in mortmain, provided they would furnish lands for charitable purposes is void; as in the case of *Attorney General v. Davies* (l), wherein *Thomas Davies*, by will dated 1801, bequeathed as follows: "The sum of 5,000*l.* more or less, as it may be wanted, to build twelve almshouses, purchase the ground, six for poor men, six for poor women, economy and convenience observed in the structure:" and then he gave the remainder of his property for the use of the Orphan School in the *City Road*, under the direction of the committee of that school for the time being, provided they would furnish a piece of ground near the school to build

(i) *Infra*, sect. v.

(j) *Ib.*

(k) *Infra*, p. 1206.

(l) 9 *Ves.* 535.

the aforesaid houses on. Upon the question, whether these dispositions were within the statute of 9 Geo. 2, c. 36, Sir *W. Grant*, M. R., said, "It must be admitted, that if the will stopped with the bequest of the 5,000*l.* it would be wholly void; for the testator gives it expressly to purchase land; and even if he had said nothing about purchasing, a bequest of money to build almshouses would be void according to the latter determinations; as the Court will not imply an intention of which the will affords no trace, that if the land should be given, then, and then only, the building shall take place; and if the original intention be a purchase, an offer to give will not cure it; for in the *Attorney General v. Nash (m)*, the trustees had purchased land with their own money, and they offered to give the land, yet the Court refused to give it effect. But it is said in this case, that in the subsequent part of the will the testator has relinquished the first intention of purchasing, and has made a provision for erecting almshouses upon ground to be given by the committee of the Orphan Hospital, who, by the information, offer to give this ground. Therefore, it is said, the charity may be executed according to his latter intention, without any violation of the Act. But the testator proposes to the committee a gift, and offers them the residue, as a consideration for their furnishing land for his almshouses, and taking the management of them and his affairs. He does not mean to give them any part of the residue unless they supply the ground for his almshouses. He says, 'I will give your charity money if you will find land for mine.' What is this but laying out money in land? It may be more or less advantageous to them, but still it is a mere bargain; money offered if land is given in return. It is an absurd distinction, that a testator shall not give land to a charity, but he may give money in consideration of another's giving land for a charity. If I am right in holding, that this is a bequest of a residue to be laid out in land, two consequences will follow: 1st. That such bequest of the residue is void. 2dly. That the bequest for erecting almshouses is void, because they are to be erected only, by what I consider a purchase of land. It may be, if the whole scheme might be carried into effect, that the Orphan School might have a benefit, for their might be a surplus; and only what is equivalent to the land for the almshouses is to be applied. But it is impossible to make an apportionment, and to declare the bequest of the residue void for a part and good for the rest.

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(m) 3 Bro. C. C. 588, *supra*, p. 1169.

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Money given to build with a direction not to purchase.

If the principal fails, the subsidiary part must fail along with it. The wish is, to connect his almshouses and their school, and to benefit the latter because of the benefit to be expected from their school. It is only on account of their contributing to his plan that he gives to them. This bequest of the residue is therefore wholly void" (n). The decree was afterwards confirmed by the Chancellor, who, with reference to the residue, observed, that if the primary gift fails, the secondary gift being totally uncertain, and fluctuating from time to time, the whole must fail.

To the preceding cases, those of *Attorney General v. Munby* (o), and *Pritchard v. Arbouin* (p) before stated may be added, and to which the reader is referred.

But, though a bequest of a sum of money to erect a school, generally is void, yet where there is an express direction that land shall *not* be purchased, the bequest will be supported.

Thus, in the case of *Henshaw v. Atkinson* (q), *Thomas Henshaw* by will, in 1807, bequeathed as follows: "Whereas it is my wish and intention that a Blue Coat School be created at *Oldham*, and a Blind Asylum established at *Manchester*, under the management and direction of certain trustees to be hereafter appointed, I hereby give and bequeath 20,000*l.* in trust, to the said trustees, to each of the said charities, subject to such uses, limitations and conditions as shall afterwards be determined for the government thereof; but I direct that the said monies shall not be applied in the purchase of lands, or the erection of buildings; it being my expectation that other persons will, at their expense, purchase lands and buildings for those purposes. And as for and concerning all the rest, residue and remainder of my personal estate, I give and bequeath the same, in trust, to the trustees of the said intended charities, to be equally divided, and for the equal benefit of each of the said charities." The testator appointed *John Atkinson* and *Joseph Atkinson*, (two of the defendants) and the plaintiff *Sarah Henshaw*, executors and executrix of his will. By a codicil, the testator gave 20,000*l.* more to the Blue Coat School, and empowered his executors to fix the establishment of the Blue Coat School at *Manchester*, instead of *Oldham*, if they thought it more convenient. By another codicil, he nominated trustees for the school, with power to fill up the number from

(n) See also *Chapman v. Brown*, *supra*, and 6 Ves. 404.

and *Giblett and Others v. Hobson*, 5 Sim. 651.

(o) 1 Mer. 327, *supra*, p. 1159.

(q) 3 Mad. 306.

(p) 3 Russ. 456, *supra*, p. 1148,

time to time and then proceeded thus : “ It is my will and intention that the sums which I have bequeathed, of 40,000*l.* to the Blue Coat School, and 20,000*l.* to the Blind Asylum, making together 60,000*l.*, shall continue in the house or firm at *Oldham*, in conformity to and during our articles of partnership, and for such longer time as my executors consider the principal and interest of the said sum secure for the benefit of the said charities ; it being my will, that the interest of the said 60,000*l.* be paid annually to the trustees of the said charities, for the maintenance and support thereof.” And the testator made a fourth codicil to his will, 27th *July*, 1809, but it was not executed and attested as required for passing real estates, or for effecting a revocation of a devise of real estates. This paper writing was as follows : “ I, *Thomas Henshaw*, do make this codicil to my last will and testament, and hereby revoke and make null and void my legacy of the close of meadow land, called *Frankhill*, which I have devised to *James Barker*, it being my intention to appropriate the said close for the building of a Blue Coat School, which I have endowed by my last will.” The question was, whether the bequests for the establishment of a Blue Coat School and Blind Asylum, were void by the statute, 9 Geo. 2, c. 36. Sir *John Leach*, V. C., in giving judgment, said, “ It is now perfectly well settled, that if a testator gives personal property to erect and endow a school or hospital, it must be considered, unless it be otherwise declared, that it was his intention that land should be acquired, and buildings made, as necessary parts of his purpose ; but here, the testator has expressly directed that no part of the money bequeathed is to be so applied.” His Honor then referred to the clauses in the will, and the bequest in the second codicil respecting the monies bequeathed remaining on the firm at *Oldham*, and concluded thus : “ The trustees have, therefore, a title to this annual payment from the death of the testator, and must apply it in the maintenance and support of the charities, although the expectations of the testator, with respect to the purchase of lands and buildings by other persons, are wholly disappointed. In fact, these expectations seem to have failed the testator in his lifetime ; for by his fourth codicil he expresses an intention, not perfected, to appropriate a particular close for the building of the Blue Coat School. These charities must therefore be established, and when the accounts are taken, the particular manner of the administration of them will come to be considered.”

Testamentary dispositions to charity not within the stat. of 9 Geo. 2, c. 36.

Money given to build with a direction not to purchase.

Testamentary dispositions to charity not within the stat. of 9 Geo. 4, c. 36.

Money given to build with a direction not to purchase.

10. It would seem also, that money bequeathed generally to *provide* a school, or other building for charitable purposes, is a valid bequest, although there be not any direction not to purchase; since such school-house or other building may be *hired*. The case of *Cantwell v. Baker* is thus cited in *Vaughan v. Parker* (r), before Lord *Hardwicke*, C., 31st March, 1747. Testator's representatives brought a bill for residue of personal estate undisposed by will against the trustees, who were also executors, and who claimed it for a charity in the will in these words: "I give all the rest and residue of my estate, of what nature soever, to trustees, in order to and towards erecting a school for the education of poor boys in such a place, in such a manner as the trustees should direct and appoint." It was insisted to be a lapsed legacy by the Mortmain Act, and that erecting a school must mean buying and building; and it was added by the counsel for the charity in the principal case *arguendo*, and not denied by the Court, "Your Lordship held, that erecting included the founding, and consequently the maintenance of the Master; which was a different thing from the mere school place itself: but that the end might be obtained by *hiring* a house, and directed accordingly; and this for ever."

In *Johnston v. Swann* (s) the testator bequeathed 7,100*l.* to be invested in the funds, and the interest and dividends to be applied in paying the expenses of *providing* a proper school-house for the instruction of twenty poor girls: it was insisted on behalf of the charity, that the testator meant the school-house should be hired; and that lands might be hired for a charitable purpose on the authority of the case last cited. Sir *John Leach*, V. C., decided in favour of the charity; observing, the question was, whether, to execute the expressed purpose of the testator, land must be purchased for erecting a school. The testator has directed only, that a proper school-house should be provided, which may be by hire; and it is some evidence of his intent that land should not be bought, that the trustees are only to apply the dividends, and no part of the principal, to the expense of providing a school-house. It is said, he meant the charity to continue for ever; but this intent may be executed, without necessity for the purchase of land.

But in *Attorney General v. Hodgson* (t) Sir *L. Shadwell*, V. C.,

(r) 2 Ves. sen. 184, *Bell's* ed.

(t) 10 Jur. 800.

(s) 3 Mad. 457.

held a bequest for the establishment or institution of a charitable receptacle for certain old men, if the same could be done, was void, as intimating a direction that land should be acquired for the purpose: his Honor distinguished the case from *Johnston v. Swann*. Testamentary dispositions to charity not within the stat. of 9 Geo. 2, c. 36.

In *Dixon v. Butler* (t) the bequest was of a sum of money to trustees in trust, in case the inhabitants of a parish should, within seven years after her death, build a church within the said parish, to apply the sum as they should think fit towards defraying the costs of such church. The Court of Exchequer held the bequest valid within the Statute of Mortmain.

11. A further exception occurs in a bequest of monies to be raised out of real estate, for the purpose of erecting a monument to the testator's memory, ^{which} is not within the Statute of Mortmain. 11. Produce of real estate to be laid out in erecting a monument.

Thus, in the case of *Mellick v. The President and Guardians of the Asylum* (u), *R. Russell*, by his will, dated 1784, after desiring that he might be buried at the east end of the vault of the parish church of *St. John, Southwark*, and giving various minute directions respecting his funeral, and bequeathing several pecuniary legacies, devised his freehold estates to trustees, upon trust to sell, and apply the produce as follows, namely, 2,000*l.* in erecting a monument to perpetuate his memory in the parish of *St. John, Southwark*; 100*l.* to *Dr. Samuel Johnson* on condition of his writing an epitaph to be inscribed on his said monument; and the sum of twenty guineas to the rector of the parish of *St. John's*, on condition of his consenting to the placing up of the monument. The testator directed the monument to be immediately set about after his decease; and to be completely finished as soon as possible, not to exceed one year after his decease. The residue of the monies arising from the sale was to be applied in payment of some of his legacies. The testator then gave legacies payable out of his personal estate, to several charitable institutions. In the event of the rector of *St. John's* refusing, he revoked his legacy, also the legacy given to the parish school; and in that event, he desired to be interred in the parish of *St. George the Martyr*, and gave similar legacies to the rector and school of that parish. The residue of his personal estate the testator gave to the Asylum, providing that it should be liable to keep his monument in repair. The testator died in

(t) 3 *Yo. & Coll. (E.)*, 677.

(u) 1 *Jac.* 180, and see *Adnam v.*

Cole, 6 *Beav.* 353, and *Mitford v.*

Reynolds, 1 *Phil.* 185.

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1784, and in the following year a bill was filed for carrying the trusts of the will into execution. The Master's report, in 1799, stated that all the sums charged on the real estate, except the 2,000*l.* given to erect the monument, and the twenty guineas to the rector of *St. John's*, had been paid out of the rents and profits; and that there was a balance arising from the rents remaining in the trustees' hands, and which, with the sum of 466*l.* 3*s.* 7*d.* would be sufficient to meet those two sums. Upon the petition of *John Mellick* and *Sarah*, his wife, (who was the testator's heir-at-law), an order was made, in 1799, that, on payment by the petitioners of the 466*l.* 3*s.* 7*d.* to the trustee, he should convey the freehold estates to *Sarah Mellick* and her heirs, or as she should appoint. The estates were conveyed accordingly, and *Sarah Mellick* died in 1803, leaving the plaintiff, *John Mellick*, her eldest son and heir-at-law, and administrator. The rector of the parish of *St. John* refused to permit the erecting of the monument, and the 2,000*l.* and 21*l.* had not been applied for that purpose, but paid by the trustees to the Asylum. Some funds, arising from the real and personal estates of the testator, had been paid into Court. A bill of revivor and supplement was filed by the president and guardians of the Asylum claiming the fund in Court, and a cross bill was filed by the plaintiff claiming as heir-at-law, and administrator of his mother, for the sums of 2,021*l.* given for the purpose of erecting the monument, with interest, and so much of the funds in Court as arose from real estate. The president and guardians of the Asylum stated, they were ready to apply that sum according to the directions of the will. It was understood the present rector of *St. John's* was willing that the monument should be erected; and it was contended for the heir-at-law, that the trust for erecting the monument was void under the statute of 9 Geo. 2, c. 36; and *Durour v. Motteux* (v), and *Howse v. Chapman* (w), were cited; and that the gift had failed by the refusal of the rector of *St. John's*; and that the testator's intention was, that the monument should be erected within a year, or not at all; and that the consequence would be a resulting trust for the heir. For the Asylum, it was insisted, that the question was decided by the former decree, and by the order in 1799. Sir *Thomas Plumer*, M. R., observed, the first objection that is made to this gift is upon the Statute of Mortmain; that it is a devise to a charitable use, and therefore void. If this were the only question, I strongly incline to think, that

(v) 1 Ves. 320, *supra*, p. 539.

(w) 4 Ves. 542, *supra*, p. 986.

it would not constitute any valid objection, for I think that this is not a charitable use within the meaning of the statute. The statute does not condemn the application of property to charitable purposes, but in order to protect persons in *extremis* from imposition, permits it only by a deed inrolled in the lifetime of the donor: in this it is contrary to the former law, which, while it rendered a gift to superstitious uses void, excepted gifts to charitable uses, and held them good. Now, what are charitable uses has been declared by the statute of *Elizabeth* (x), and in *Duke* (y). They are when the donor appropriates a gift either to charity or to some public purpose, such as the repair of bridges, ports, havens, &c., not operating in any manner to the benefit of himself. But the Statute of Mortmain does not bear a resemblance to any thing like a sumptuary law, and does not apply to property expended like this, by the party on himself, for the gratification of his own vanity, on an object which, instead of having any similitude to charity, is the very reverse of it: the builder of the monument is to be paid for his labour only. It stands on the same footing as an expensive funeral; and it has never been argued that the expenses of a funeral cannot be defrayed out of real estate. There is nothing to control the general right, incident to property, of disposing of it either in the party's lifetime, or after his death, as he may think proper: and though the sum, which this testator has devoted to the erection of his monument, may be disproportioned to his station in life, the Court cannot, on any such grounds, extend the construction of the statute." On the other ground, his Honor was of opinion, it could not be the intention of the testator that the monument should be erected at so remote a period as the present, (thirty-seven years), but, on the contrary, within a year after his death; and it appeared to be his intention, if not expressed, yet strongly implied, that, in the event of the rector's refusal within that time, the monument should not be erected at all. His Honor decreed, that the plaintiff, the testator's heir-at-law, was entitled to the sum of 2,021*l.*, with interest at 5*l.* per cent., from 1799, when the accounts relating to the freehold estates were closed.

Testamentary dispositions to charity not within the stat. of 9 Geo. 2, c. 36.

Produce of real estate to be laid out in erecting a monument.

12. Again, shares in the "*London Gas Light and Coke Company*" are not within the Statute of Mortmain, as was decided by

12. Shares in gas and other companies.

(x) 43 stat. c. 4.

(y) Page 131.

Testamentary dispositions to charity not within the stat. of 9 Geo. 2, c. 36.

Sir *Knight Bruce*, V. C., in *Thompson v. Thompson* (z), the shares being made personal estate by the sixth section of the act, by which the company was incorporated, 50 Geo. 3, c. 143 (30th April, 1812); and shares in other incorporated companies, with similar provisions, whether for constructing or maintaining docks, railways, or other public works are equally exempt.

Policies of insurance.

13. Neither are policies of insurance within the statute 9 Geo. 2, c. 36, where the insurance is payable out of the funds or stock of the insurance society, although the capital may consist partly of real estate. In *March v. Attorney General* (a), the testatrix gave to charities the residue of her personal estate, which consisted, among other things, of policies of insurance from the "Equitable, Economic, Law Life, and Amicable Insurance Societies;" by these policies, the societies engaged either to pay "out of the funds," or that "the funds shall be liable" to pay the sums insured; or that "a due share of the funds shall be paid" to the person effecting the insurance. Lord *Langdale*, M. R., held the policies were not within the statute: his Lordship observed, that the grantees of the policies contracted for a sum of money to be paid on a future event; that whatever might be the property possessed by the grantors, the grantees had not, by their contract, any control over it or lien upon it; and that if the money secured by a policy was to be deemed connected with land, so as to bring it within the statute, there would be no reason why the same consequence should not attach upon any debt owing by any person having real estate or chattels real.

SECT. V. Construction of charitable Bequest, and administration of the Fund (b).

The construction of charitable bequests and administration of the fund.

Having considered what are valid testamentary dispositions to charitable uses, we proceed in this section to treat of the rules adopted by the Court of Chancery in the construction of bequests to charity, and in the administration of the fund, which, according to those rules, it considers the testator has rendered disposable for charitable purposes.

General rule of construction in favour of charitable bequests.

It was observed in a former page, that the Court is liberal in its construction of these charitable dispositions; and this is in

(z) 1 Coll. 381; see also *Sparling v. Parkes*, 10 Jur. 448, and 1 Keen, 234.

(a) 5 Beav. 433.

(b) The 7 and 8 Vict. c. 97, applies exclusively to Ireland.

conformity with the Civil law (c). So that, where a testator has merely expressed an indefinite purpose of charity, without at all or not sufficiently specifying the particular mode in which, or the objects in favour of whom, he intends those charitable purposes shall be carried into execution, the Court will support the general charitable purpose; so also where the testator has specified a particular object or mode of applying his bounty, and that specific object or mode of application (not clearly being of the essence of the gift) fails, or becomes impracticable; or where the fund is more than sufficient for the purpose specified; in all these and similar cases, the general charitable purpose will be supported.

Construction of charitable bequests and administration of the fund.

With respect to the mode of carrying into effect the charitable intention of the testator, we observe—

First, that where the legacy is *not* given to trustees, but to charity generally, and the testator omits to name the object to be benefited, or any person to select the object, in such case it rests with the King, as *parens patriæ*, under sign manual, to point out the charitable objects; and the Court of Chancery directs the Attorney General, in whose name the bill must be filed (d), to apply to the Crown accordingly, the Attorney General being a necessary party to all suits for charitable funds, except where a legacy is given to the officer of an established institution, as part of its general funds (e).

General rule as to the administration of the fund.

First, where legacy is not given to trustees, no objects named nor persons to select: mode of distribution rests with the King.

Secondly, that the Court will not only support the gift, but take upon itself the application of the fund, and for that purpose will direct a scheme to be laid before the Master, in all the following cases (namely), where trustees are not named, and the testator refers to some future selection of the charitable objects to be made by himself or others; or where the trustees are originally named but fail by *matter ex post facto*, and there is a descript class of objects specified; or where trustees are named but no objects specified, the bequest being to charity generally; or where the charitable fund is distributable at the trustees' discretion; or where the charity named cannot take effect; or where the fund is more than sufficient for the charitable purpose specified (f).

Secondly, distribution by the Court, where future selection referred to but not made, or where objects specified but the trustees fail, or where bequest to charity generally, or at trustees' discretion, or where fund more than sufficient.

In all these cases, where the testator has originally by his will vested the execution of his charitable purposes in trustees, or other persons, having a power of selection, and which purposes

(c) Dom. 2 v. p. 161, 162.

(d) See *Moggridge v. Thackwell*, 7 Ves. 75, 86.

(e) 1 Sim. & Stu. 40.

(f) See *Moggridge v. Thackwell*, *ubi supra*; also *Baker v. Sutton*, 1 Keen, 224.

Construction of charitable bequests and administration of the fund.

Bequests to charity generally, no trustees, &c. named.

are originally indefinite or become so *ex post facto*, the Court assumes the administration of the fund; not in a strict sense, because it is an indefinite gift to charity, but because it is a trust, and in exercise of its peculiar jurisdiction over that species of property; so that it is immaterial, whether all or any of the trustees originally named, or the persons having the power of selection, happen to die during the testator's lifetime, or after his death, without executing the charitable trust, or refuse to act; or whether the name of the trustee or person delegated to select the objects, be erased by the testator, and no substitution made; for in all these cases, the Court will take upon itself the execution of the charitable trust.

But where the charity is to be administered out of the jurisdiction of the Court of Chancery, it will not take into its own hands the administration.

The foregoing observations, it is presumed, will be verified by the cases stated in the following pages; in the detail of which, the rules respecting the construction of the gift itself, and the mode of applying the fund, when given, will necessarily be blended.

1. Where legacy given to charity generally, no trustees nor objects named, nor power of selection given.

1. The *first* rule may be stated thus:

Where the legacy is given to charity *generally*, and not to trustees, and where the testator does not name the object he intends to benefit, nor any person to select that object, the Court, in support of the general charitable intention of the testator, holds the gift to be a fund disposable to charity; but the nomination of the objects devolves upon the King as *parens patriæ* under his sign manual, for which the Court directs the Attorney General to apply accordingly. This rule may be collected from the observations of Lord *Eldon*, in *Moggridge v. Thackwell*, before which, the rule appears to have been unsettled. In that case, his Lordship, after citing the case of the *Attorney General v. Matthews* (g), the *Attorney General v. Syderfen* (h), and *Clifford v. Francis* (i), says, "These three cases seem to have established, at the year 1679, that the doctrine of this Court was, that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of, not by a scheme before the Master, but by the King, the disposer of such charities in his character of *parens patriæ*." This distinction is also recognised in *Paice v. The Archbishop of Canterbury* (j).

(g) 2 Levinz, 167.

(h) 1 Vern. 224.

(i) Freem. B. R. & P. C. 330, ed. by Smirke.

(j) 14 Ves. 372.

In the case of *Attorney General v. Syderfen*, Mr. Syderfen, the defendant's brother, by his will, among other things, charged his manor in the West of *England* with raising 1,000*l.* out of the profits, to be applied in such charitable uses as he had, by writing under his hand, formerly directed. No such writing being found, and the defendant, the brother and heir-at-law, being in possession of the estate, the bill was brought in the Attorney General's name, at the relation of the governors of *Christ's Hospital*, setting forth the will, and that no such writing as was mentioned therein was now to be found; and that, therefore, the application of this charity was in the King; and charging that the testator had frequently expressed good intention towards this hospital; and that the King, being informed that there was no such writing to be found as aforesaid, had declared his will to be, that the money should be laid out for the benefit of the mathematical boys, which were of his own foundation in *Christ's Hospital*; and it was prayed that the sum might be so applied. Upon the hearing, the Lord Keeper said, it was no question but the charity being general and indefinite (the writing not being to be found), the application of the money was then in the King; and his Majesty having declared his pleasure to have it disposed of for the benefit of the mathematical boys of his foundation in *Christ's Hospital*, he thought it could not be better laid out; and forasmuch as by the will it was intended to be a permanent charity, he referred it to a Master, who, by the approbation of the Attorney General, should see it laid out in land for the benefit of the mathematical boys; and decreed accordingly.

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It appears as Lord *Eldon* observes (*k*), from the papers in the last case, that previously to the decree, the King's sign manual had been obtained, and was brought into Court, and the decree was made according to that; and his Lordship said, "That the hospital found out that there was such a will, and if so, the money charge, as the law then stood, was clearly at the disposal of the King; that it was perfectly familiar, that where an interest of such a kind is given to charity, or where there is an escheat for want of heirs, and the fact is not communicated, it is usual to petition the King, stating there is such an interest, and praying some reward, upon the ground of the discovery. The hospital had petitioned the King, and upon which petition the Attorney General filed his information, and that produced the cause."

(*k*) In *Moggridge v. Thackwell*, 7 Ves. 70.

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In the case of *Clifford v. Francis* (l), a testator devised the surplus of his estate, after debts paid, to his executors, to be disposed of by them to pious uses; the question was, whether the Commissioners for Charitable Uses had power of this; and the Court took this difference, that when money is given to a charity, without expressing what charity, there the King is the dispenser of the charity, and a bill ought to be preferred, in the Attorney General's name, for that purpose; but if the charity be expressed, there it is in the power of the Commissioners for Charitable Uses. Lord *Eldon* observes, in *Moggridge v. Thackwell* (m), that he cited the above case, to show that it contained a doctrine precisely the same as *Attorney General v. Syderfen*, and *Attorney General v. Matthews*; thus guardedly mentioning the case in reference, as it is presumed to the fact, that it was a bequest to executors as trustees, to distribute; and in which case, according to the rule as now settled, the fund would have been distributable by the Court, according to a scheme.

In the case of *Attorney General v. Matthews* (n), the bequest is to the *poor* generally, which though not absolutely indefinite, is so nearly so as to be considered a bequest to charitable uses generally, and is subject to the same rules as cases of that description. In the lastly mentioned case, *Frier* the testator, after giving to several particular charities by his will, devised the surplus for the good of the poor people for ever. A bill was brought that the surplus, which was devised indefinitely, might be applied for the benefit of *Christ's Hospital*; by the King's direction, it was so decreed, although there were poor kindred of the testator, who insisted they were within the equity of that general devise to a charity. There is a much fuller report of this case in *Levinz* (o), and it appears to be reported in *Finch* (p), by the name of *Jones v. Peacock*. From the report in *Levinz* it appears that the estate had been conveyed by feoffment to feoffees to the uses of the testator's will, the ultimate use being that the feoffees should stand seised to the use of the poor in general for ever; but with reference to this circumstance, Lord *Eldon* observes in *Moggridge v. Thackwell*, it was difficult to say there the trustees were to determine what poor people were to take, recollecting what the law did upon uses so expressed, you

(l) Freem. B. R. & C. P. 330.

and *Att. Gen. v. Peacock*.

(m) 7 Ves. 74.

(o) P. 167.

(n) Also called *Frier v. Peacock*,

(p) P. 245.

cannot well call them trustees for the poor. The difficulty in this case is, that it seems a devise to trustees still existing, and that the meaning was, that the distribution should be by them, if they thought proper; but Lord *Apsley* thought otherwise.

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The rule is the same where the charity named is void, as against the policy of the law. There the Court will give effect to the charitable purpose of the testator, and support the legacy; but the distribution of the fund will rest with the Crown. Of this, the case of *De Costa v. De Pas* before stated (*q*), is an instance, in which the King, by sign manual, directed the mode in which the charitable fund was to be applied. Upon this case Lord *Eldon* observes, that the decision must have been upon the principle that the testator's principal intention was charity.

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Seemle, Where charity is void as against policy of law.

In the case of *Attorney General v. Baxter* (*r*), the same principle was recognised. There *Robert Mayot* bequeathed 600*l.* to Mr. *Baxter*, to be distributed by him among sixty pious ejected ministers. The Lord Keeper, conceiving the charity against law, adjudged it void; and that the money should be applied for the building of *Chelsea Hospital*: but it being observed to the Court, that the practice had always been to apply charities in *eadem modo*, and this being intended for ejected ministers, should go amongst the clergy; and thereupon the Lord Keeper decreed it for the maintenance of a chaplain for *Chelsea Hospital*. The decree was afterwards reversed by the Lords Commissioners; and the 600*l.* was ordered to be distributed according to the will. Lord *Hardwicke*, in his notes (*s*), says, "This decree was reversed, not upon any thing contradicting the general principle reported to have been stated, but because really a legacy to sixty particular ejected ministers, to be named by *Baxter*, and as of a legacy to those sixty individuals." Lord *Hardwicke*, therefore, affirms the principle, but asserts that it was ill applied in that case.

So also in *Gates v. Jones*, cited in *Attorney General v. Guise* (*t*), where a charity was given to maintain popish priests, it was applied to other uses by the King.

But by the statute 2 & 3 Wm. 4, c. 115, noticed in a former page (*u*), the law is now altered as it respects charitable bequests to Roman Catholic schools or places of worship.

We proceed to the cases illustrating the second general rule before stated (*v*), in all of which we shall find the charitable

Second general rule.

(*q*) P. 1120; Amb. 228.

(*r*) 1 Vern. 247.

(*s*) Per Lord *Eldon* in *Moggridge v. Thackwell*.

(*t*) 2 Vern. 266.

(*u*) P. 1122, (*a*).

(*v*) *Supra*, p. 181.

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purpose supported, and the Court pointing out the mode of distributing the fund.

For the convenience of the reader, and for the sake of more easy reference, we shall divide the rule into its different component members, and attempt a classification of the cases, according as they exemplify and establish each branch of the rule. In the course of the inquiry, the reader will notice that some individual cases serve at once to illustrate several parts of the rule.

1. No trustees, &c. named, but testator refers to a future appointment of objects by himself, which he does not make.

1. We begin with that class of cases, in which there are neither trustees nor objects named, nor persons to select those objects; but the testator gives the legacy to such charitable purposes as he should by a *future instrument* in writing appoint, and he omits to make any appointment: in such case the legacy will be supported, and the Court will effectuate the charitable purpose by appointing the objects to be benefited, ordering a scheme to be laid before the Master.

It is difficult, as Lord *Eldon* observes (*w*), 'to raise a solid distinction between an *original* gift absolutely indefinite and without qualification, and a case in which, by matter *ex post facto*, the gift stands before the Court in consequence of that accident, as if it had been originally given indefinitely, without any means for carrying it into execution prescribed.' Still, however, it seems to be established with reference to the mode of applying the fund, and may be stated, that where the gift as made originally by the will is absolutely indefinite, the appointment of the objects devolves upon the Crown, by sign manual, as before shewn; but where the gift becomes indefinite by matter *ex post facto*, the Court will appoint *by a scheme to be laid before the Master*. The first authority in proof of the last statement is the *dictum* from *Freeman* (*x*), which is as follows: "It was said, and not denied, that if a man deviseth a sum of money to such charitable uses as he shall direct, by a codicil to be annexed to his will, or by a note in writing, and afterwards leaves no direction, neither by note nor codicil; the Court of Chancery hath power to dispose of it to such charitable uses as the Court shall think fit; and so it was held in the case of Mr. *Syderfen's* will (*y*),

(*w*) 7 Ves. 83.

(*x*) 330, b., ed. by *Hovenden*, C.C., p. 261.

(*y*) See *Att. Gen. v. Syderfen*, as

before stated and observed upon by Lord *Eldon*, *supra*, p. 1182, and see 7 Ves. 73.

and in the case of one *Jones*: but if the will points at any particular charity, as for maintenance of a schoolmaster, or poor widows, then the Court of Chancery ought not to direct it to any other purpose, but such as is pointed out by the will; as if the devise should be for such school as he should appoint, and he appoints none, the Court may apply it to what school they please, but for no other purpose than a school, although it may be for what school the Court think fit."

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At first sight it would appear, that *Wheeler v. Sheer* (z) is opposed to this *dictum*. In that case, Sir *George Wheeler*, by will, in 1719, after bequeathing several legacies, gave the residue of his personal estate to his executors in trust, after payment of debts and legacies, and to employ it to such *charitable uses* as by codicil he should appoint. By a codicil, in 1721, he revoked some legacies, and gave others, and directed that the residue should be applied *to such uses and purposes*, as by any other codicil or codicils should be directed; but he did not name any charitable purposes. By a second codicil, in 1722, referring to the death of his son *George*, an executor appointed in his will, he constituted the plaintiff, with his son *Charles*, the other executor, for the uses, trusts and purposes of his will; but the testator did not name any charitable purpose. In 1723, he made a third codicil, which did not contain any direction as to his personal estate. The question was, whether the King should have the disposal of the surplus of the personal estate to charitable uses; and it was argued that the first codicil was a revocation of the last clause in the will. Lord Chancellor *King* held the legacy void, observing, "Where a man devises to such charitable uses as he had appointed, that supposes he had made an appointment, though it could not be found; but here it is in his thoughts to do so. By the codicil he confirms the will, and makes the trust of the surplus more extensive; it was to be in trust for a charity, if he directed any." Lord *Eldon*, in the case of *Mills v. Farmer* (a), suggests that the ground of the decision might have been, that the codicil revoked the charitable purpose expressed in the will; and, upon that principle, it was clearly law. And he subsequently observed, that the codicil either revoked the will, or it operated to include *other* objects besides those directed; and that, in any view, the circumstances of that case were such, as to render it no authority to govern the case before him.

In the case lastly referred to, *James Mills*, by will in 1806,

(z) *Moseley*, 288, 301.

(a) 1 Mer. p. 86, 97

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after giving certain pecuniary legacies to his relations and others, and appointing the defendant *Farmer* and another executors, proceeded thus; "The rest and residue of all my effects I direct may be divided for promoting the gospel in foreign parts, and in *England* for bringing up ministers in different seminaries, and other charitable purposes as I do intend to name hereafter, after all my worldly property is disposed of to the best advantage." Afterwards, in 1807, the testator addressed a letter to his executors, telling them he had sent to Messrs. *Robarts* and *Curtis*, a box containing his will and other writings, and therein gave to them and other persons legacies. After the death of the testator, the will and letter were proved. The bill was filed by the next of kin, praying an account and distribution of the residue, as being undisposed of by the will and codicil. Sir *William Grant*, M. R., before whom it appears the case was little argued, decreed the legacy void for uncertainty; but upon appeal, Lord *Eldon* overruled the decree, and supported the legacy. In the course of his judgment, his Lordship observed, "It is, therefore, no longer to be contended that a disposition in favour of a charity can be construed according to the rules which are applicable to individuals. This is the view to be taken of the case mentioned by *Freeman*, that where a testator gives to such charitable uses as he shall direct, and gives no direction, the Court will direct the uses to which it shall be applied. The case of "one *Jones*," which is there referred to, is not now to be found; but if there is no express decision which has gone precisely the same length with the note in *Freeman*, it may safely be affirmed that neither is there any decision which has determined that the doctrine there laid down is not law, and it has certainly been cited as an authority in almost every case of a gift to charity that has come into question from those days to the present. Admitting all that Lord *Thurlow* had said with regard to the decision in *Wheeler v. Sheer*, it is quite impossible to look into the circumstances of that case, and say that it is a case which at all touches on the doctrine in *Freeman*. If that doctrine be law, the decision of the Master of the Rolls on the present case cannot be right. If the law be, that the nomination of the particular objects is only the mode, and the gift to charity the substance, of the testamentary disposition, and that the declaration of such a gift is substantially sufficient to give effect to the disposition; it is surely much less strong to say that, where the testator has himself expressed certain modes by which that effect may be given to it, it shall be carried into execution accordingly, than to say that,

because he has expressed an intention of naming certain other modes, in addition to those which he has named, and has not named those others, therefore his intention must fail altogether; than to say (in short) that because he has contemplated a division in certain proportions, which he has omitted to render certain, that uncertainty must operate to prevent his general intention, which is ascertained, from taking effect in any manner whatever. Would this be to decide according to the authority of established precedents? How can uncertainty as to the mode operate to defeat the intention, when the impossibility of a certain mode taking effect at all does not so operate? I repeat that I am sorry for it, because I am very unwilling to differ from any opinion pronounced by so great an authority as that of the Master of the Rolls; but in the present case, I find myself driven to say that, in my judgment, this is a bequest to charitable purposes. It therefore follows, that a scheme must be laid before the Master, regard being particularly had to the charitable institutions denoted by the testator, but not so as to confine the bequest to those only."

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In this case, it appears, there was not any bequest of the residue to trustees; but upon this Lord *Eldon* observes, "although the testator does not expressly mention his executors in the clause bequeathing the residue, he has clearly named executors in the will, and the direction contained in the residuary clause can be understood only as imperative upon his executors" (b). It may further be remarked upon the above case, with reference to the mode of distribution by a scheme to be laid before the Master, that in this case certain objects are specified in the will, as objects of charity; and it forms one of the class of cases, to be noticed in a future page of this chapter, in which the Court assumes the power of pointing out the mode of distributing the fund by a scheme: it seems however to establish the *dictum* in *Freeman* to its full extent (c).

The reader will distinguish this case from that of *Vezey v. Jamson* (d), stated in a future page (e), wherein the bequest was decided to be void for uncertainty; the bequest not being for an exclusive charitable purpose, but giving to trustees a discretion, either to dispose of it in charitable or benevolent purposes, public or private.

(b) 1 Mer. p. 96.

(d) 1 Sim. & Stu. 69.

(c) See *Simon v. Barber*, 5 Russ.

(e) *Infra*, p. 1243.

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2. No trustees named, but testator refers to a class of objects, but no individuals of the class selected.

2. We proceed to the second class of cases, wherein there are no trustees or persons to select originally named; but the nature of the charity is described by referring to the objects of it *generally*, while no particular individuals of the descript class are selected. Here the Court will support the legacy, and appoint the particular objects of the descript class to be benefited.

Thus, in *Attorney General v. Clarke (f)*, *George Cranstoun*, by his will gave the interest of 4,200*l.* Bank annuities, to the *poor inhabitants of St. Leonard Shoreditch*; and the question was, whether the legacy was void for uncertainty in the description of the legatees; but Sir *Thomas Clarke*, M. R., gave his opinion in favour of the charity, and said, "The Court has done so in many cases, where the expressions were much more general and uncertain; that in those cases the Court forms a judgment, upon taking all the circumstances into consideration, and inclines in favour of the disposition, *ut res magis valeat*. In the case of *Attorney General v. Rance*, 18 July 1728, a legacy was given to the poor: there were no words in the will, which discovered what poor the testator meant; but it appearing, that the testator was a *French* refugee, the Court directed the legacies to be given to the poor refugees. The *Attorney General v. Browne*, 18 November 1749; the words were very general; but his Honor did not mention them. The words in the present case are not so uncertain, as in those cited. The word *inhabitant* bears a very general sense, and may extend to everybody living in the parish. But as it could not be intended that the poor inhabitants, which are relieved by the parish should have benefit of this legacy, which, in effect, would be giving to the rich, and not to the poor, his Honor declared that the distribution of the legacies was to be confined to the poor inhabitants of *St. Leonard's Shoreditch*, not receiving alms: and ordered a scheme to be laid before the Master for such distribution.

In the case of *White v. White (g)*, a testatrix bequeathed 3,000*l.* stock for putting out "our poor relations" apprentices. Afterwards, by a codicil, she confined it to two families. Upon a bill to have the trusts of the will carried into execution, it was contended for the defendant, that this was not a charity; as if it were to the poor in general, being merely a legacy to poor relations; and if not to be supported as a charity it was void, exceeding the limits allowed by law. But Sir *William Grant*, M. R., decreed otherwise, observing, "Are not such cases supported as

(f) Amb. 422.

(g) 7 Ves. 423:

charities? There was a case of this kind, *Mocatta v. Lousada*, lately before me, where a great number of Jews were the objects. I may execute it as far as I can. I do not know why those who are ready, may not be put out apprentices." The decree directed such of the objects, as were ready, to be put out apprentices; and the fund to be laid out from time to time, with liberty to apply (h).

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No trustees named, a class of objects referred to, but no individuals selected.

A similar objection to that taken in the last case was made in the *Attorney General v. Price* (i), but it did not prevail.

In *Powell v. Attorney General* (j), *James Pindleton*, a native of *Liverpool*, by will in 1802, bequeathed the residue of his estate "to the widows and children of seamen belonging to the town of *Liverpool*," and appointed the plaintiff his executor. The bill filed against the *Attorney General* and the testator's next of kin, for the direction of the Court as to the application of this residue, charged that there was no existing charitable institution for the relief of widows and children of seamen, belonging to the town of *Liverpool*; but that there were almshouses in the town for widows of seamen, erected by virtue of different charitable bequests, and a hospital under an Act of 20 Geo. 2, c. 28, for the relief of maimed and disabled seamen, and the widows and children of such as should be killed, &c., in the merchants' service. It was insisted by the defendant the next of kin, that the bequest was void for uncertainty; and he claimed the residue as undisposed of. By the decree at the hearing, it was referred to the Master to inquire, whether there were any, and what, charitable institutions for the benefit of the widows and children of seamen belonging to the town of *Liverpool*. The Master, by his report, stated several charities for poor seamen's widows, and others for the poor of *Liverpool* generally; besides the hospital mentioned in the bill: and one under the will of *Elizabeth Cain*, dated the 8th of June 1778, whereby she directed the residue of her estate to be continued at interest, or placed out on Government securities, at the discretion of her executors; and, after their death, of the rectors of *Liverpool* for the time being; the interest to be paid and distributed unto and among such poor sailors, widows, and orphans, inhabitants of *Liverpool*, as should, in their judgment, be deserving objects of charity. Upon the hearing for further directions, the question was, first, whether it was a

(h) For legacies to poor relations, see Vol. I. c. 2, s. 5.

(i) 17 Ves. 371, *supra*, p. 107.

(j) 3 Mer. 48.

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good charitable bequest; and, if so, whether it was general or to go in aid of any of those specified charities; and Sir *William Grant*, M. R., held it was a valid bequest, and that the words were sufficiently descriptive of the last of the charities mentioned in the Master's report. The order was, that the residue should be paid to *S. R.* and *R. H. R.* clerks; the now rectors of *Liverpool*, to be by them laid out in their names at interest; and, upon their death or resignation, to be transferred to their successors, rectors of *Liverpool* for the time being; the interest to be applied by them for the benefit of widows and children of seamen, belonging to the port of *Liverpool*, in like manner as the proceeds of the property devised by *Elizabeth Cain*, and applied according to the will.

Dr. *Hugh Gore* in 1690 devised and bequeathed certain properties towards the building and repairing of old ruined churches within the diocese of *Waterford* and *Lismore*, but without naming any trustee or devisee. From the death of the testator to the time of the petition, the property had been applied upon the trusts of the will. Upon a petition under the statutes 52 Geo. 3, c. 101 and 1 Wm. 4, c. 60, stating these facts, and that the heir of the testator could not be discovered, the Court of Chancery in *Ireland* referred it to the Master to settle and approve of a proper scheme for the management and due application of the charitable funds and to appoint new trustees, and to approve of a proper person in the place of the heir of the testator, to convey to such new trustees (*k*).

3. Trustees named originally, but fail by matter *ex post facto*, and a descript class of objects specified.

3. We proceed to the third class of cases, wherein, by matter *ex post facto*, there eventually proved to be neither trustees nor persons to select, though originally they were named in the will, and a descript class of objects is named by the testator.

Thus in *Attorney General v. Hickman* (*l*), the testator gave his estate and effects to *B.*, his heirs, executors, and administrators, and by a codicil, written by himself, not duly attested, declared the use, to which he would have his estate applied, in the words following: "I would have the same employed in encouraging such non-conformist ministers as preach God's word, in places where the people are not able to allow them a sufficient and suitable maintenance, and for encouraging and bringing up some to the work of the ministry who are designed to labour in God's

(*k*) In the matter of Bishop Gore's Charity, 4 Dru. & W. 270.

(*l*) 2 Equity Ca. Ab. 193.

vineyard among the dissenters; the particular method how to dispose of it I prescribe not, but leave it to their discretion, designing you (meaning *B.*) to take advice of *C.* and *D.* *B.*, *C.*, and *D.* died before the testator; and, upon a bill filed against the heir-at-law for an account of the testator's estate, and to have it applied in charity according to the will, it was objected, that by the death of *B.*, *C.*, and *D.* in the testator's lifetime, the legacy lapsed. But Lord *King* decided otherwise, saying, "*B.* was only a trustee, and to whom *C.* and *D.* were recommended, as fit persons to assist him in execution of the trust; and, though by the death of *B.*, *C.*, and *D.*, the legal estate of the legacy is gone, and the charity cannot be disposed of by the very hand, which the testator designed should have done it, yet the charity itself, which is the substance and reason of the devise, is still subsisting, and may be answered as fully by the aid and direction of this Court, as if the legatee and his counsellors were now alive."

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The case next in order is *White v. White* (*m*), which differs from the last in the fact that the name of the executors, to whose discretion the selection was entrusted by the will, was *erased* by the testator, and no other substituted; so that, at the death of the testator, there was not any person to carry his objects into effect. In that case, *Richard Holt*, by will in 1769, bequeathed the residue of his personal estate as follows: he gave half thereof to the *Foundling* Hospital; and the other half to the *Lying-in* Hospital, and if there should be more than one of the latter, then to such of them as his executor should appoint; and he constituted *A. B.* his executor. The testator afterwards struck out the executor's name, and appointed no other person executor. The plaintiff obtained administration, with the will annexed, as one of the next of kin; and insisted that the bequest to the *Lying-in* Hospital became void by striking out the executor's name, and that it should be referred to the Master, to report who were entitled as next of kin. In giving judgment, Lord *Thurlow*, C., said, "The question is here, whether the legacy is void, the executor's name being struck out, and there being no person upon whom it could devolve; or whether the Court would sustain it? It has been argued, that the Court has great extent of jurisdiction, in making legacies certain, which were before uncertain; and secondly, in applying them where it is not known to what use they were intended. There has been

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at all times, an exercise of this authority, where a legacy has been doubtfully given, as in the *Attorney General v. Syderfen* (n), which was a legacy to such charitable uses as *he had appointed*, but the appointment was not found; the Court decreed the charity to be directed by the Crown, as there *had* been an appointment." His Lordship then cited *Wheeler v. Sheer* (o), and continued thus: "The cases have proceeded upon notions adopted from the *Roman* and Civil law, which are very favourable to charities, that legacies, given to public uses not ascertained, shall be applied to some proper object. From *Swinburne* down to Lord *Hardwicke's* time, that would be the effect where the object is disappointed; but the present case is different, Here the testator, giving a legacy to the next of kin, and to the executor, names a particular charity a residuary legatee; the question is, only, how the trust shall be carried into execution. I remember to have read a case somewhere (p), where a legacy is given to *B.* for the benefit of non-conforming ministers, with the advice of *C.* and *D.* At the testator's death, *B.*, *C.*, and *D.* were all dead, yet the Court sustained the legacy. It must be referred to the Master, to see unto which of the *Lying-in* Hospitals it is fit it should be paid" (q).

The next case is *Moggridge v. Thackwell* (r), to which frequent reference has been made, and which is justly celebrated for its elaborate and able judgment. There the testatrix gave the residue of all her personal estate to *James Vaston*, (who was not one of the trustees for the general purposes of her will), his executors and administrators, desiring him to dispose of the same in such charities as he thought fit, recommending poor clergymen with large families and good characters. *Vaston* died about nine years before the testatrix, who had full knowledge of his death, but never made any alteration in the residuary bequest. The question was, whether the charitable bequest would be executed by the Court: Lord *Thurlow* decided it was clearly a trust legacy in *Vaston*; and that, if it were such a trust as the Court could execute, it should not lapse by the death of the trustee, but survive for the benefit of the *cestui que trust*; and his Lordship observed, "The only question, therefore, is, whether I am at liberty to say these words are such a disposition as this Court

(n) *Supra*, p. 1182.

(o) *Ib.* p. 1187.

(p) *Att. Gen. v. Hickman*, last case.

(q) See also *Att. Gen. v. Gleg*, 1 *Atk.* 356,

(r) 1 *Ves. jun.* 464; 7 *Ib.* 36.

must find for that purpose. There are many cases, where the most general gifts for charity have been executed. The circumstance, that the trustee is unable by death to dispose of it, makes no difference, because it is a power given to a person. Suppose there was no gift, but only a power to the executor to dispose to such and such charities; there the charities survive. But here it is much stronger, because the testatrix has recommended a more particular charity than the general one. In that view it is impossible to say, the charity must not be sustained. Therefore, refer it to the Master to settle a plan, having particular regard to that recommendation; and let all parties have costs out of the estate, and as between attorney and client, since it is a cause between relations."

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The cause having been brought before Lord *Loughborough*, C., for further directions upon the Master's report, he intimated, that it was fit the decree, so far as it respected the charitable disposition should be reheard. Under that intimation, a petition of rehearing was presented by the next of kin, and, upon that petition, the cause was reheard by Lord *Eldon*, C. His Lordship, after a very able consideration of most of the cases, which have been, or will be, adduced in the present section, proceeded thus: "All the cases prove, that, where the substantial intention is charity, though the mode, by which it is to be executed, fails by accident or other circumstances, the Court will find some means of effectuating that general intention. In this case it is not to be argued merely upon *Vaston's* death. I agree with Lord *Thurlow*, that makes no difference; for the question is, what the testatrix must be taken to have meant, if she had died immediately after the will was executed; and it is infinitely difficult to contend, that the Court can construe it otherwise, because he died in her life, than if he had outlived her. It is said, if he had, he would have had all his life to select the charities. I doubt that extremely. It is assuming the question. The Court at least would call upon him to act. The *Attorney General v. Gleg* (s) proves that. The question would arise exactly in the same way; for, if he had survived her, and had addressed himself to the execution of the trust, and had died suddenly, while about it, and before he had completed it, the mode would have failed precisely, as by his death before her; for unless the means, by which it is to be executed, were effectuated by his act, the circumstance of his dying before her can make no difference as

(s) 1 Atk. 356; Amb. 584, and *infra*, p. 1201.

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to the question, whether the Court will supply other means. The question results upon the whole, did she intend he should be a trustee for charity? If these authorities are to stand, though I had for ten years a strong persuasion upon this will, that she meant the objects should be selected by him only, I must check such conjectures by attention to the rules, upon which the Court acts with regard to charities; and I am reluctantly driven to say, there is no substantial difference between these words, in which she has bequeathed to *Vaston*, to dispose in such charities as he shall think proper, and the words, in which it was expressed in the *Attorney General v. Hickman*. Those cases call upon me to say, the general intention of this testatrix, (who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects), was to devote her property to charity; and according to these precedents, *Vaston* was only the means and instrument, by which that general intention was to be executed; and, therefore, this Court will carry that general intention into effect. The next question, by what means that is to be done, is a most difficult question; for, it being established, that where money is given to charity generally and indefinitely, without trustees or objects selected, the King as *parens patriæ*, is the constitutional trustee, it is very difficult to raise a solid distinction between an original gift absolutely indefinite and without qualification, and a case, in which by matter *ex post facto*, the gift stands before the Court in consequence of that accident, as if it had been originally given indefinitely, without any means of carrying it into execution prescribed. All I can say upon it is, I do not know, what doctrine could be laid down, that would not be met by some authority upon this point; whether the proposition is, that the Crown is to dispose of it, or the Master by a scheme." After citing the cases, his Lordship continued: "The run therefore of the cases with the exception of the last (*t*), that have occurred, rather import, that, where *originally a trust* is created for the distribution of a charity, and the trust is not carried into execution, because it was originally a trust, and not in a *strict sense* a general, indefinite, gift to charity, general and undefined, or to the poor in general, the Court would execute it by a *scheme*; and in the case I put of *Vaston's* surviving the testatrix, and partly executing, and dying, before he had completed the execution, the question would come to this, whether the Court should supply the defect;

(*t*) *Att. Gen. v. Peacock, supra*, p. 1184.

or, on the other hand, whether the Court would carry on that, which it might have taken into its own hands, if a bill had been filed against *Vaston*; and he had begun to execute in consequence, and had not lived to finish it: the question there would have arisen, whether the Court should take it upon itself, as it would, controlling his discretion, if he had lived; and whether the Court might not have gone on itself to select the objects. Lord *Thurlow* seems to have thought, there was a ground for distinguishing it. There is a singular expression, used by him in one of the cases, 'the property becoming *fiscal*.' Yet, he seems to have thought, that if *Vaston* in the execution of his duty, according to a sound construction of his right, had excluded certain persons, that would have been controlled by this Court. I allude here to the recommendation about poor clergymen. If the question was dryly upon this, whether that makes him a trustee for poor clergymen, it is very difficult to say, it does in a strict sense; for if words of recommendation are not to be taken to be imperative, unless the objects and the subject are certain, it is difficult to say, that if recommendation is mounted upon a gift purely discretionary, where the subject is wholly uncertain, that shall be a trust. Lord *Thurlow* thought it necessary for him to apply the strict question, trust or no trust; but upon the principle, very strongly stated in the *Attorney General v. Gleg (u)*, that, however extensive, this Court would control the discretion. Lord *Thurlow* seems to think, a due exercise of the discretion would entitle the Court to call upon him to attend to the recommendation; and accordingly, in the decree directs the scheme to have regard to that recommendation; and if *Vaston* had been alive, I think, he would have directed *Vaston* to have the same regard; and I doubt, whether, if the decree, upon the principles attaching to charitable uses, must have called upon the trustees, it can be said, that, because the trustee is dead, the Court is not to make a decree, ordering such direction; for no such order could be given to the King, executing 'by sign manual. Therefore, I rather think, the decree is right. I have conversed with many persons upon it. I have great difficulty in my own mind; and have found great difficulty in the mind of every person I have consulted: but the general principle thought most reconcileable to the case is, that, where there is a general indefinite purpose, not fixing itself upon any object, as this in a degree does, the disposition is in the King by sign manual: but where

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the execution is to be by a trustee with general or some objects pointed out, there the Court will take the administration of the trusts."

In conformity with the principle so fully discussed in the preceding case, Sir *James Wigram*, V. C., decided that of *Reeve v. Attorney General (v)*. There *Thomas Meyrick*, the testator, bequeathed stock to the "Society for bettering the Condition of the Poor," upon trust, to apply the income in paying the house rent of seven or more country labourers in the principality of *Wales*, on producing a certain certificate from the clergyman or churchwardens as to character. He bequeathed other stock to "the Society for the Encouragement of Female Servants," upon trust, to distribute the income annually in gratuities to servants in the same principality, to be selected in a similar manner. The two societies renounced the trusts, and disclaimed the legacies. The Vice Chancellor held, that the discretion of the trustees was not in those cases of the essence of the trust, that the trust being originally created for certain definite objects, and not a gift to charity generally or indefinitely, it was not a case in which the disposition of the fund required the authority of the sign manual; and that the Court would carry the trust into effect by means of a scheme.

4. Trustees named, no objects specified, but bequest to charity generally.

4. The *fourth* class of cases we shall adduce in proof of the preceding general rule is, that wherein *no* objects of charity are specified by the testator, but he bequeaths the legacy *to trustees* for charitable purposes *generally*, or for such as they, in their discretion, shall think fit. In both cases the Court will support the legacy, as a valid bequest to charity, and direct the mode of distributing the fund by a scheme; and, it should seem, will control the trustees in the exercise of the discretion reposed in them by the testator.

Thus in *Baylis v. Attorney General (w)*, which, in effect, is a bequest to trustees for charitable purposes generally; there *M. Church* bequeathed the legacy of 200*l.* to the ward of *Bread Street*, according to Mr. — his will. The bill was filed by the alderman and principal inhabitants of the ward, to have the directions of the Court for the application of this charity, and

(v) 3 Hare, 191.

(w) 2 Atk. 239, cited in *Moggridge v. Thackwell*, and see Lord *Eldon's* observations thereon; also

Martin v. Douch, Ch. Ca. 198, and see Sir *J. Wigram's* observations in *Mayor of Gloucester v. Wood*, 3 Hare, 146, 148.

the Attorney General was made a defendant. Lord *Hardwicke*, C., said, "Though the alderman and inhabitants of a ward are not, in point of law, a corporation, yet, as they have made the Attorney General a party, in order to support and sustain the charity, I can make a decree, that the money may, from time to time, be disposed of in such charities as the alderman for the time being, and the principal inhabitants shall think the most beneficial to the ward." His Lordship directed, that the plaintiff should lay a scheme before the Master for the application of the 200*l.* and interest to some charitable uses, for the benefit of the ward.

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In the case of *Attorney General v. Herrick* (x), the gift was supported; but, with respect to the course adopted by the Court in directing a scheme to be laid before the Master, it is an authority at variance with the general rule as now settled (y). In that case, *William Whatten*, by will, in *August*, 1732, (before the operation of 9 Geo. 2), devised all his messuages, lands, &c., in the county of *Leicester*, or elsewhere, unto the defendant, *Herrick*, and others, upon trust, by mortgage or sale, to pay his debts, legacies, and funeral expenses; and the overplus money, and also the rents and profits for ever thereafter, of so much of the said messuages, &c., as should remain unsold, to be paid and applied to *charitable and pious uses*; and appointed the defendant, *Herrick*, and others, executors. The information was to have the trusts of the will carried into execution; and the Lord Chancellor said, "I was inclined in favour of the heir; but the authorities are too many and too strong to contend with;" and, after citing the cases before stated in this section, his Lordship continued, "although the charity be uncertain to what poor it shall be applied, his Majesty may dispose of it." The cause came on again on *February* 28th, Car. 2, when his Lordship said, "no objection to the uncertainty of the object, for the King may appoint." His Lordship then concluded, that he would apply to his Majesty, as Lord *Nottingham* did in the case of the *Attorney General v. Peacock*.

Again, in *Paice v. The Archbishop of Canterbury, Mary Wilks*, by will, in 1800, among other bequests, disposed of her residuary estate in the following words: "All the remainder of my different bequests I give and bequeath to the Archbishop of *Canterbury* and the Archbishop of *York*, for the time being, in trust

(x) Amb. 712.

(y) See *Moggridge v. Thackwell*,

7 Ves. 75, and *Paice v. Archbishop of Canterbury*, 14 Ves. 372, next case.

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for charitable purposes; and anything not specified, I commit to the discretion of my executors:" and, after some legacies to servants, she concluded thus, "I desire my executors to make some donations out of my property to the poor of the different places, where I have estates, besides those already mentioned." One of the questions, upon further directions, was, whether the general residue passed to the archbishops for charitable purposes, or to the executors under the words, "any thing not specified, &c.;" or to the next of kin, as undisposed of. Lord *Eldon* decided, that the general residue did pass to the archbishops for charitable purposes, and concluded his judgment thus: "Therefore, after the donation to be made by the executors to the poor, the extent of which is almost unlimited, the general residue is to go to charitable purposes; and must be the subject of a scheme before the Master. Where the bequest is to trustees for charitable purposes, the disposition must be in that mode; but where the object is charity, without a trust interposed, it must be by sign manual. That is the distinction I adopted in *Moggridge v. Thackwell*"(z).

In the case of *Attorney General v. Stepney* (a), the testator bequeathed personal estate to trustees for the use of the *Welsh* circulating charity schools, as long as they should continue, and for the increase and improvement of Christian knowledge, and for promoting religion, and to purchase bibles and other religious books. Lord *Eldon*, C., held the bequest good throughout, his judgment assuming that a religious purpose was a charitable purpose. The same proposition was acknowledged and acted upon in the following case.

In *Baker v. Sutton* (aa), the bequest was of a residue of monies, securities for money, and personal estate, to trustees, upon trust, that they and the survivors, and the executors and administrators of such survivors, should dispose of the same for such religious and charitable institutions and purposes within the kingdom as in the opinion of them, or the major part of them, should be deemed fit. Lord *Langdale*, M. R., distinguishing the principal case from *Williams v. Kershaw* (b), decided the bequest valid, and directed a scheme should be submitted by the trustees to the Master for the charitable application of the fund, so far as it

(z) *Supra*, p. 1194.

(a) 10 Ves. 22.

(aa) 1 Keen, 224. 234.

(b) July, 1835, before Lord Cot-

tenham, when M. R., cited in 1 Myl. & Cr. 293; 1 Keen, 274, note; see also *Townsend v. Carus*, 3 Hare, 257, and *Martin v. Margham*, 14 Sim. 230.

consisted of pure personalty. Part of the residue consisted of interests in land and money payable out of, or directed to be invested on mortgage of real estate, and the bequest as to that was void, and the Court accordingly directed the usual apportionment of the testator's estate *pro rata*, as between the next of kin and the charities.

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5. A *fifth* class of cases in illustration of the preceding rule consists of instances, wherein the bequest is to trustees who are named, but the fund is directed to be distributed by them *at their discretion*, either where there *are* or where there *are not* objects named. Thus in *Attorney General v. Gleg (c)*, Mr. Wright, having by will left several sums of money to be distributed in charities therein described, at the discretion of his executors, named three persons executors, one of whom died before the filing of the information. The question in the cause was, whether this was only a bare authority in the executors, or coupled with an interest; and the Lord Chancellor said, "I am of opinion that the executors, as taking the whole personal estate, out of which the charities were to issue, had an authority coupled with an interest, as executors have been always held to have in the case of legacies; and therefore the power of nominating the several persons who were to partake of the charity, is continued to the survivor of them. But though this is such an authority coupled with an interest as would survive, yet it is so far a trust, that in case of misbehaviour the Court may interpose; for it must be allowed, that the Court has a particular free and extensive jurisdiction in the case of charity, and not confined to the proper or formal methods of proceeding requisite in other cases. I am of opinion, that the executors could not divide the charities into three parts, and each executor nominate a third absolutely, because the determination of the property of every object was left by the testator to the direction of all the executors, and so much of the information as seeks a specific performance of a pretended agreement to that purpose, was dismissed with costs, to be paid by the relators" (*d*).

5. Trustees named and fund distributable at their discretion.

The case of *Attorney General v. Baxter*, stated in a former page (*e*), and to which the reader is referred, comes within the class of cases now under consideration.

(c) 1 Atk. 356.

London, 3 Bro. C. C. 171, *infra*. 1205.

(d) And see *Att. Gen. v. City of*

(e) Page 1185.

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5. Trustees named, and fund distributable at their discretion.

So also in *Cook v. Duckenfield* (f), *Thomas Cotton*, by his will, gave all his real estate to his son in tail, remainder, in case of his dying a minor, or without issue, to the defendant and others, for such charitable uses as he the testator should appoint by codicil or otherwise : and, as to his personal estate, after some payments thereout, he directed his trustees to call in and dispose of the residue, as they or the survivors should think fit ; and in the event of his son dying before twenty-one, or marriage, to be disposed of by them among the widows and orphans of dissenters, and to his *poor relations*, in such proportions as his trustees should think fit ; and made the trustees executors. The testator, by a codicil, after reciting the devise of his real estate to trustees, upon his son's dying a minor or without issue, to such uses as he should declare by codicil or otherwise, directed that such estate should, at the discretion of his trustees, be sold or retained in their possession, and that the purchase money or rents should be distributed among such persons, for such uses and in such manner as he should by any writing appoint ; and in default thereof to such person or such purposes, and in such manner and proportions, as all or the majority of the trustees, or the survivors or survivor of them, or the heirs of the survivor, should think fit ; and in the event of his son dying a minor or without issue, he devised to the trustees his dwelling house in *York* with the appurtenances, to sell or keep in their hands, and apply the purchase money or the rents to the same uses as above declared in regard to his real estate. The testator's son died a minor, and without issue, and the testator left no directions as to the application of his real estate, or of his dwelling house at *York*, and the trustees claimed the beneficial interest in both. But Lord *Hardwicke*, C., after declaring that the trustees were only entitled as trustees, upon the fair construction of the will and codicil, ordered the defendants to lay a scheme before the Master for applying the testator's estate to such charitable uses as should answer his intention ; and also for the application and distribution of the money which should be coming in out of the growing rents and profits, or out of the money which should arise from any future sale ; and in the scheme the defendants were to have a particular regard to the *poor relations* of the testator, and their circumstances (g).

(f) 2 Atk. 562.

(g) See also *Waldo v. Caley*, 16 Ves. 206, *infra*, Ch. 21. Sect. ix.

In the case of *Attorney General v. Freeman* and others (h), a testatrix bequeathed the residue of her monies and securities for money to the defendants, in trust to lay out the same and pay the interest, &c. "to the *poor inhabitants of the parish of St. Luke* for ever:" and the testatrix gave the trustees a power of appointing other trustees. There existed a local Act of Parliament vesting in persons, entitled guardians of the poor, property holden in trust for the parishioners of the parish, as also all benefit and donations made or to be made to or for the poor within the same parish, "not directed or liable to be applied for the support of any private poor or charity, or by the donors or otherwise particularly appropriated." Upon a suit for carrying the will into execution, it was insisted on behalf of the said guardians of the poor, that the gift belonged to their treasurer for the time being, to be by them appropriated according to the directions of the act. To this claim the deputy remembrancer had excepted, to whose exception an exception was made in behalf of the guardian of the poor; but the Chief Baron overruled the latter exception, deciding that the appropriation was within the meaning of the act, and that he could not take the distribution of the fund out of the hands of the trustees appointed by the testatrix, for the purpose of giving it to the guardians of the poor under the act. So that from this judgment it should seem, where a bequest is given in the above form, the trustees have a right to apply the interest among such poor inhabitants as they may consider proper objects of the bequest; and that in the above instance it was not the intention of the Legislature to deprive the trustees of that discretion, nor in any manner to interfere with their execution of the trusts of the will.

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In the case of *Attorney General v. Buller* (i), lands were devised in 1635 to trustees for the erection of workhouses for setting the poor on work and other purposes for the relief of the poor in such parishes as the trustees or the survivors or survivor, &c. should think fit so as the parish of *St. Nicholas, Rochester*, where the testator resided were one. One of the trustees under a scheme sanctioned by the Court had appropriated the incomes for the benefit of a parish in *Devonshire*, leaving a very small benefit for the parish of *St. Nicholas*. The Court, thinking that it must have been surprised into the former order, and that the scheme was not conformable to the trusts, and acting upon the

(h) 1 Dan. Exch. Rep. 117, and 5 Price, 425.

(i) 1 Jac. 407.

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principle of its always paying particular attention to the specified objects of the founder's bounty, directed an equal division of the fund.

So where a scheme for the management of a charity founded by a testator in 1679, had been made by the Court in 1759, and modified and extended by subsequent orders in 1777, 1795, and 1810, the Court, on an information filed, held itself bound to consider the manner in which the scheme so established and modified and extended, operated in practice, and whether a change of circumstances had or had not, since 1795 taken place to an extent rendering it fit to alter or add to the scheme: and the Court being of opinion, that the scheme operated in practice little, if at all, in favour of what was mainly, in the opinion of the Court, the object of the testator's bounty, directed a reference to the Master, to inquire whether the scheme could not be modified or varied, so as to more fully meet the testator's intention (j).

In the case of the *Commissioners of Charitable Donations v. Sullivan* (k), the testatrix bequeathed to W. Y. and A. O. such a sum of stock as she might be in possession of at her decease, to be by them applied to charitable purposes according to her instructions deposited with A. O., it appeared in the cause, that the instructions to A. O. were verbal, and that the application of the fund was left to his own discretion. Sir E. Sugden C. (L), held that it was a good charitable bequest, and directed a reference to the Master to settle a scheme for the distribution of the fund.

6. Where the particular charity named, though not illegal, cannot take effect, but is executed *cy pres*.

6. We proceed with the *sixth* class of cases, wherein a particular charity is named by the testator, but which, though not illegal, cannot take effect. In such cases, the Court will effectuate the general charitable intention, but substitutes some other mode of application consistent with such intention, and accordingly directs a scheme to be laid before the Master. If, for instance, a personal fund were bequeathed for erecting two or three new fellowships at *Oxford* or *Cambridge*, for the benefit of young persons educated at a particular school; although the college named should dissent to the disposition, and refuse to increase their number of fellows, yet if another college would consent to admit fellows so endowed, or if some other plan could

(j) *Att. Gen. v. Glasgow College*, 10 Jur. 676.

(k) 1 Dru. & W. 501.

be devised to establish the charity within the terms of the will, it seems that the general intention would not be allowed to be defeated by failure of the particular mode prescribed for effecting it. This reasoning is equally applicable, when the specific mode of executing the trust of the charity is defeated by the negligence or misconduct of the trustees.

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In *Attorney General v. The City of London* (1), the Right Honourable *Robert Boyle* by his will of the 18th of *July* 1691, and by a codicil in *December* in the same year, directed that the residue of his personal estate should be disposed of by his executors for such charitable and pious uses as they in their discretion should think fit; but recommended to them to lay out the greater part for the advancement of the Christian religion, and appointed *Richard Earl of Burlington*, *Sir Henry Ashurst*, and *John Warr*, executors. The executors afterwards laid out 5,400*l.* which was considered by them as the principal part of the testator's personal estate, in the purchase of the manor and lands of *Brasserton* in the county of *York*, with a view to settle them, so that the income might be for ever applied to the advancement of the Christian religion. They then directed the whole annual income of the manor and lands to be applied towards the propagation of Christianity among the natives in or near *New England* in *America*, and for advancing the knowledge of that religion in *Virginia*; which application to charity was confirmed by a decree of the Court, accompanied with a direction, that part of the rents should be applied by the corporation for propagating the Gospel in *New England* and the parts adjacent in *America*, towards instructing the infidels in *Virginia* in Christianity, subject to the regulations of the Bishop of *London*, &c. The information insisted, that by the declaration of independence by the United States, it became improper to transmit any longer the rents of the estate for the charitable purposes; and it therefore prayed, that the rents then due, and the accruing rents might be applied in some other manner in this kingdom, or in some part of his Majesty's dominions, for the advancement of the Christian religion; and that the sum of 13,849*l.* 2*s.* 10*d.* three *per cent.* consols, part of the charitable fund, should be invested in lands, and the rents thereof, and intermediate dividends applied to the like purposes. Lord *Thurlow*, C., after the argument, said, that the trusts to the corporation to convert neighbouring infidels, ceasing for want of objects, there being

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now no neighbouring infidels, the charity must be applied *de novo*. As to the other parties, he could not now consider them as corporations: therefore the Master must propose a plan for the application of the produce of the estates, according to the intentions of the testator (*m*).

Again, in the case of *Attorney General v. Boulton* (*n*). Sir *Francis Nethersole*, in 1653, conveyed a messuage lately erected by him for the habitation of the minister of *Polesworth*, with the appurtenances, then in possession of *Richard Bell*, minister of *Polesworth*, and several other premises, and the impropriate tithes of *Warton*, *Dorton*, and *Porley*, and a rent-charge to several trustees (naming them) ministers of the gospel; to hold to them in fee, upon trust to permit Sir *Francis* and his assigns during his life to take the rents; and after his death that they, or the major part of them, or such other persons, or the major part of them, who for the time being, should have the freehold and inheritance of the said messuages, &c. should permit the vicar of *Polesworth* for ever, if he should be there settled by the nomination and appointment of Sir *Francis* in his life, or of the trustees, or major part of them, or such other persons, who for the time being should have the freehold and inheritance and no other, to dwell in the said messuage so erected, and intended for such minister's habitation, and to enjoy the same without interruption; and upon farther trust, that they should place a sufficient schoolmaster in the edifice afterwards covenanted by Sir *Francis* to be erected for a schoolmaster's habitation, and from time to time to provide a schoolmaster and mistress; and dispose of the rents of all the said premises, for the maintenance of a schoolmaster and mistress for ever, to teach the children of the parish of *Polesworth*, the boys to read and write, the girls to read and work, and both to be instructed in the principles of the true Christian religion; and to such other pious and charitable uses, as Sir *Francis* should, by his own experience, find to be most conducive to the advancement of the knowledge and practice of the true religion, and most beneficial to the poor of *Polesworth*, and should declare and appoint by any writing in his life, or by his will; and in default of such declaration, upon trust that the trustees, &c. should yearly dispose of the rents of the premises, either for the increase of the maintenance of the vicar of *Polesworth* for ever, who should be appointed by Sir *Francis* in his life, or by their pro-

(*m*) See also *Hayter v. Trego*, 5 Russ. 113.

(*n*) 2 Ves. jun. 380.

curement afterwards; but not without such procurement; or for the maintenance of the schoolmaster or mistress; or for repairs of the school; or for various other purposes therein directed, or to any other such pious and charitable uses as should be termed most expedient, and most likely to be continued in perpetuity, and declared by the said trustees, or the major part of them, in writing under their hands after the decease of Sir *Francis*. The only proof of a declaration of uses by Sir *Francis* was a book in the hands of the trustees, in which their proceedings were entered. In that book the following entries were contained: "*November 3rd, 1659. The said trustees of Sir Francis Nethersole, for the charitable uses aforesaid, did meet at Polesworth aforesaid, in pursuance of their said trust; and ordered, that the declaration of the said Sir Francis Nethersole be likewise now entered verbatim, as a direction to the said trustees in their proceedings.*" "Whereas, I have by deed or deeds, conveyed divers messuages, lands, tenements, rents, tithes and hereditaments, upon my trusty friends (the trustees, naming them) ministers of the gospel, and their heirs upon trust, that they should dispose of the rents, issues and profits thereof, from time to time, as I should by any writing in my lifetime, or by my last will declare and appoint; now I do hereby declare and appoint that the messuage with the appurtenances wherein Mr. *R. Bell*, now minister of *Polesworth*, doth now inhabit, shall for ever hereafter be for the habitation of the said *R. Bell*, and his successors, lawful ministers of *Polesworth* church; and for the increase of the maintenance of him and his successors, I do appoint all the tithes of *Warton*, *Dorton*, and *Porley*, mentioned in the said deed or deeds and one yard land of land, of meadow, and pasture, with the appurtenances now in the occupation of *J. D.*" (part of the premises comprised in the conveyance); "provided that such minister be settled and placed there, in such manner as in the said deed or deeds is appointed and required, and not otherwise." Then there was an appointment of yearly stipends to the schoolmaster and mistress, and 5*l*. a year to the school of *Tamworth*, upon condition, that six children of *Polesworth* and *Warton*, should be freely educated there, to be approved by his trustees or their heirs, or the major part. Then there were directions for keeping the schoolhouses, and the dwelling houses of the master and mistress in repair with the overplus rents, and for putting out apprentices, children of the inhabitants of *Polesworth*, at the discretion of the trustees and the ministers, subject to some restrictions; and that the trustees should meet annually at *Polesworth*, when a sermon

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should be preached before them, for which the minister should have twenty shillings yearly; and after that, "That the said trustees do dispose of all other the profits of the premises, to such pious and charitable uses, as they or the major part of them shall think fit; and my desire is, that an account be then given of all things, and fairly written and entered in a book concerning their trust from time to time; the which book, with all the evidences and writings, that are or shall be made concerning the premises, I do appoint shall be safely kept in some convenient place in the minister's house, locked up in a chest, provided for that purpose, whereon three locks are to be affixed, and three of the trustees to keep the keys: whereof I do appoint one key to my nephew *Biddulph*." To this entry, there was neither date nor signature: but the trustees admitted, that they and their predecessors always considered the declaration as a direction to them for executing the trust, and always executed it accordingly. Upon the 7th *December*, 1779, the vicar of *Polesworth* being very old, the trustees by memorial to the Lord Chancellor, (the presentation being in the Crown), represented the age of the incumbent, and requested, that upon a vacancy, his Lordship would appoint a clergyman recommended by them. Upon 20th *October*, 1787, the incumbent died; and on the 27th he was buried. Between his death and burial, *Dabbs*, one of the trustees, waited upon the Chancellor; and, not having an opportunity of seeing his Lordship, left a letter, informing him of the death of the incumbent, and requesting him to wait a short time for the recommendation of the trustees. No farther steps being taken by the trustees for two months, the Chancellor, without any recommendation from them, issued a *fiat* for the presentation of *W. R. Norton*, who was instituted 17th *January*, 1788, and inducted a few days after. The trustees refusing to admit this vicar to the benefits of the trust, the information was filed at the relation of the vicar. The defendants, by their answer, represented, that *Hacket*, one of the trustees being absent from *Warwickshire*, they deferred calling a meeting till the 22nd *December*, 1787, thinking it not right to take any step in his absence; and that they did not then make any recommendation, because, finding the relator was presented, they thought it would be in vain. That since the time *R. Bell* quitted the vicarage, none of the vicars were presented, but by the procurement or recommendation of the trustees, except *J. Baker*, who, they believed, was presented without such recommendation, and he was not permitted to reside in the house, or to enjoy the tithes and parcels in land, or the rent thereof: but

by articles of agreement in 1663, reciting that he became vicar without such recommendation, and was therefore incapable of enjoying those benefits, to settle all disputes about it during the time he should be vicar, on his releasing all claim under the trust, *Biddulph*, one of the trustees, out of the respect he bore him, covenanted to pay him 5*l.* a year, so long as he continued vicar; and they contended that the relator was not entitled to the benefits intended for the vicar of *Polesworth*; and also represented that they were preparing, according to their power, to apply the fund to other charitable purposes, but submitted to dispose thereof as the Court should direct. Upon an inquiry, directed by Lord *Alvanley*, M. R., as to the dates of the deaths of the vicars, and the recommendation by the trustees, two only could be found. One was in these terms: "We approve of — *Shaw* as a proper person to be presented, to the vicarage of *Polesworth*, and humbly hope your Lordship will present him accordingly." This was signed by the trustees, and dated 20th *January*, 1747, on which day the preceding incumbent was buried. The other was as follows: "All the trustees, except *C. J.*, being out of the country, do certify, that we do approve — as a proper person to be presented to the vicarage of *Polesworth*, and humbly hope your Lordship will present him accordingly." This was dated the 19th *October*, 1758, on which day the preceding incumbent was buried. These recommendations were accepted. His Lordship, in giving judgment, observed: "As to the doctrine of *cy præs*, as applied to charities, this sensible distinction has prevailed; the Court will not decree execution of a trust of a charity in a manner different from that intended, except so far as they see that the intention cannot be executed literally; but another mode may be adopted consistent with his general intention, so as to execute it, though not in mode, in substance. If the mode becomes by subsequent circumstances impossible, the general object is not to be defeated, if it can be attained. In the *Attorney General v. The Bishop of Oxford* (o), the purpose was, to build a church in the parish of *A.*, and the parish would not let the church be built: Lord *Kenyon* very properly said that it could not be built anywhere else, and the intention must totally fail. So Mr. Justice *Buller*'s opinion in *Attorney General v. Bailey* (though there may be some doubt about it in that case), went upon that ground. But the Court has said, where the general intention may be executed, it shall. In a case

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(o) Stated *infra*, p. 1221.

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before me, *Brantham v. East Burgold*, the testator directed bread to be distributed to poor persons attending divine service, and chaunting his version of the Psalms. They could not be chaunted, because not authorized; but I thought his general object was, to give the poor people the bread, and the chaunting the Psalms was only accessory, because he thought his version as good as any other. Apply these principles to this case. Sir *F. Nethersole* had two objects: the first was a general charitable object, and very proper; an anxious desire to provide what he specified in his declaration, what he thought a competent maintenance for the vicar. There was also another object. The question is, whether that was equally important, and was annexed to the first, so that they must stand and fall together. It was to secure to himself or his trustees the recommendation or approbation, at least, of the person nominated. If both these purposes can be effected, they ought; but did he mean the first object to fail, if, from the obstinacy or neglect of his trustees, the second could not take effect;" and, after remarking upon the neglect of the trustees in presenting a recommendation of a proper person to the Chancellor, his Lordship cited the case of *Attorney General v. Leigh*, thus: "The testator gave 100*l*. to be laid out in building seven houses, and the rectory of *B.* to *John* and *James Every*, and the heirs of *John*, upon condition and to the intent that they should erect seven houses, and lease them to seven poor men, such as they should think fit, and gave the profits to them after defraying the expenses; and, in case of default in the performance of the trust for three months after the same ought to have been performed (which, I suppose, means the building the houses), the same for ever after to go to the minister and churchwardens of *B.*; I apprehend he meant, that then the trust should devolve upon them. Then a commission of charitable uses issued. It is observable, that under such commission, they thought they might add to or prescribe the mode of executing the intention. It decrees that *John Every* should erect the houses, and before *Christmas* next place therein seven poor men or women of the parish of *B.*, which was not required by the original; and so upon death or removal, the vacancies were to be filled up by other poor men or women of the parish of *B.*, within six months after they should become vacant, and 3*l*. to be paid to each of them. Afterwards, upon an information, the heir insisted that he had a right to nominate any poor persons, without regard to the parish of *B.*; but the Court confirmed the decree of the commissioners, and decreed, that the heir,

within two months after notice of a vacancy, should nominate out of the parish, and for default, it should devolve to the parish. He had nominated two persons not of the parish, and yet those two persons nominated in an irregular manner, according to the decree, were permitted to enjoy as long as they lived." His Lordship then said: "Hence, it appears, the Court will not permit the general intention to fail for want of circumstances annexed, which by the fault or neglect of the parties cannot take effect: therefore this vicar is entitled to the benefits intended for the vicars of *Polesworth*; not upon the idea, that if the trustees had recommended in proper time, and that recommendation had not succeeded, that then he would have been entitled; but upon this, that the general object was, that there should be a good minister; and there was a secondary intention, that he should come in with the approbation of the trustees. The question is, whether, under these circumstances, I do not answer his intention better by giving this benefit to the vicar, though, from the unfortunate neglect of the trustees, he came in without their recommendation. I am of opinion, they ought to have taken more pains than they did, and their neglect shall not defeat the general intention; therefore declare, that the relator is entitled to the house intended for the habitation of the minister, the tithes, &c. and direct an account of the rents and profits."

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Again, in the *Attorney General v. Andrew (p)*, *John Andrew*, doctor of laws, by his will in 1747, in order to make a secure and suitable provision for his relations, and relying upon the justice, care, and integrity, of the society thereafter mentioned, directed, that as soon as a suitable purchase of freehold lands might be met with, all his three *per cent.* annuities in the Bank of *England*, should be sold and invested therein, and settled to the following uses, *viz.*, that the rents should be paid half-yearly to his sisters, *Ann Andrew, Elizabeth Woodward, Bridget Andrew, and Lois Andrew*, equally, during their joint lives, and to the survivors and survivor of them; and after the death of the last survivor, then to the use of the college or hall of the Holy and Undivided Trinity in the University of Cambridge; and that the lands should be vested in the college; which, by license of mortmain, they were enabled to take; and that four new scholarships should be then founded: the scholars to be chosen, to be such as should have been educated at *Merchant Taylors' school, London*; who should have been in the bench or table of the

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school; who, besides the usual allowance and payments made to the other scholars of the said house, should receive 5*l*. quarterly from the bursar; and the remainder of the rents of the estates, as they came in, to be put out at interest until 20,000*l*. should be raised to be laid out in additional buildings to the college, either according to the plan then already made, or such other as the society might think more convenient; and he directed, that so soon as the 3*l*. *per cent*. annuities should be vested in land, the account might be made yearly of the several receipts and payments in the same manner as the causeway account was then kept, and at the same time; and that the master for the time being, should be allowed out of the rents and profits of the estates, 5*l*.; the bursar, 5*l*.; and each fellow, who should be present at the making up of the account, twenty shillings; and the bursar to be allowed a salary of 20*l*. a year for his trouble in receiving and paying the rents to the testator's sisters punctually, according to the direction of the will; and, after the 20,000*l*. should be raised for the building, the testator directed, that four new fellowships should be erected, and added to the then present number, upon the same footing and subject to the same rules and statutes, and with the same provisions, allowances, and privileges, in all things as the other Civil law fellowships; and to be chosen and appointed in the same manner; saving, that no person should be qualified, or capable of being chosen or appointed by lapse to any of the said fellowships, unless he should have been educated at *Merchant Taylors'* school, and should have been in the bench or table of the school, if any might be found fitly qualified in either of the universities of *Cambridge* or *Oxford*: those who were, or had been, scholars of the house of the college, first to be preferred, if fit; and when the fellowships should be added, the account to be discontinued and cease; and the rents of the estates to be applied to the general use of the college: but the salary of 20*l*. *per annum* to be continued to the bursar; and 10*l*. *per annum* to be added to the salary of the law lecturer. The testator directed, that, until a proper purchase could be made, the 3*l*. *per cent*. annuities should remain in the same fund, and the dividends be received by his executrix, for the use of herself and her said sisters, and the survivors and survivor of them equally; and he desired Dr. *Simpson*, master of the college, and Dr. *C. Pinfold*, jun., would be pleased to assist his executrix in purchasing the estates, with the approbation of the college, that the same might be settled according to his will, so as his sister might receive the income punctually,

and without trouble; and he gave to each of them 100*l.*; and, in case any loss should happen, he directed that his executrix should in no wise be answerable for it: the charge of the purchase, or otherwise, arising from settling the same, to be paid out of the principal, and not out of the interest of the 3*l. per cent.* annuities. He gave to his brother, the Rev. *W. Andrews*, 1,000*l.* Bank stock, and to his daughters, *Sarah* and *Thomasine*, 1,000*l.* Bank stock a piece. He likewise gave to his brother the interest of 1,050*l.* lent upon the *Huntingdon* and *Cambridge* turnpike, to be applied for the use and maintenance of his son, *John Andrew*, for life, in such manner as his brother should appoint; and in case the same should be paid off, to be placed out again at interest, and after *John's* death, he gave the principal to the master, fellows, and scholars of *Trinity Hall* aforesaid; to be laid out in lands for the use of the society, towards the better enabling them to support the additional scholarships and fellowships; and, until the same should be erected, the income to be made part of the fund intended for the additional buildings, and to be entered in the account before directed to be kept. He gave to the college the farther sum of 100*l.* and a specific legacy of plate; and he gave the residue of his personal estate to *Lois Andrew*, and appointed her sole executrix. By a codicil of the same date with his will, the testator directed, that in case his sister, *Bridget*, should survive his sisters, *Woodward* and *Lois*, as her health would not permit her to enjoy what he had given her, the college should pay her 200*l.* a year clear of all deductions; and that the remainder of his 3*l. per cents.* and *India* stocks, should be applied to the account towards the additional buildings or the profits of the estates purchased therewith; and then, taking notice of the death of his sister, *A. Andrew*, since the writing of his will, he directed, that the 1,000*l.* *East India* stock, thereby given to her, be added to his 3*l. per cent.* annuities, and to the uses in the same manner and form, and to all the same intents and purposes as they were directed to be settled and enjoyed. The testator died, without leaving any issue. *Bridget Andrew*, *Elizabeth Woodward*, *Lois Andrew*, and *John Andrew*, survived him. At the time of making his will, and at his death, he was possessed of 500*l.* Bank stock, 17,200*l.* three *per cent.* consolidated Bank annuities, 1,000*l.* reduced Bank annuities, of 1726, 1,000*l.* *East India* stock, and 1,050*l.* due to him upon the said turnpike security, and other personal estate. The funds having never been laid out in land, and *Bridget Andrew*, *Elizabeth Woodward*, and *Lois Andrew*, being all dead, the latter, who was

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in 1768, since the first argument. The entries related to the transfers of the stock, and the receipts and payments of the dividends. The first question was, whether the acts of the college amounted to an acceptance of the trusts of the will, and which Lord *Loughborough* decided in the negative; and upon the second question, which only relates to the subject of the present section (namely), whether the trusts could be carried into execution *cy pres*, his Lordship observed: "As to the other part of the case, it is not fit to decide upon it, without giving an opportunity to state any proposal with regard to this charity. I have not looked at all the cases referred to. Some of the cases seem to have gone the length of raising an idea, that the doctrine of *cy pres* as to a charity, ought never again to be mentioned in this Court. I am not quite clear of that. This case, the devise being for a college, is quite clear of the Mortmain Act. It is not affected at all by it. The purpose of the testator is clearly out of the provision of the statute. Its being to be laid out in land, makes no difference. It does not fail either from any imputation, that can be cast upon the intention of the testator; for he was not devising any folly impracticable in itself. All could be done, if the college would have accepted it. The execution of his purpose for a charity, directed to a course of education is frustrated by events contingent, and quite independent of the purpose; as if the trustees, according to whose discretion a charity was to be adopted, had died. It is fit to see what sort of proposal can be stated upon it. It would come near the purpose, if *Trinity Hall* would not admit them as fellows, but were willing to let them stand, as exhibitioners. That would be near the purpose of the intention. I do not know that it would wander very widely from the intention, if any other college were disposed to receive fellows so well endowed as the fellows probably will be. What I proposed to do, was to dismiss the information, so far as it prays that the college may be bound by the directions of the will, with regard to the establishment of laying out the money upon buildings, and providing for the addition of four scholars to be fellows; to direct an account of the money received by the college; to direct the college to transfer the stocks, the turnpike security still remaining out, the bond to be deposited with the Master; and the interest in arrear upon it received by the college to be paid in: all parties to have their costs out of the estate; reserving farther considerations until after the Master shall have made his report; directing him to receive any proposal made to him on the part of *Merchant Taylors'* school, for the establishment of a charity

within the terms of the will. If they can find the means to lay a proposal of an establishment with regard to the four scholars, such number of scholars as they think that school will afford, I should wish to have a particular object for my consideration, whether that object is so near the intention, that I can execute it."

The decree was drawn up accordingly.

In the case of *Attorney General v. Bowyer (q)*, Sir George Downing being seised in fee of freehold and copyhold estates, and possessed of leaseholds for life and years, by will, in 1717, devised and bequeathed the same to trustees, their heirs, executors and administrators, upon trusts after declared; as to the freehold to the use of Sir Jacob Garrard Downing for life, with divers remainders, in strict settlement, all of which eventually failed, with remainder to the use of the trustees, in trust, that they should as soon as might be, out of the rents and profits of the premises, purchase the fee simple of some piece of ground in *Cambridge*, convenient for a college; and should build thereon all such houses, &c., as should be fit for that purpose; which should be called *Downing College*; and he directed that a charter should be obtained for founding such college, and incorporating a body collegiate of that name, within the university of *Cambridge*; and that such college should consist of such head or governor, and of such scholars, members, and other persons, for the time being, and should be maintained, governed and ordered, by such laws, rules, and orders, and in such manner, and therein should be professed and taught such useful learning, as his said trustees and their heirs, with the consent and approbation of the Archbishops of *Canterbury* and *York*, and the Masters of *St. John's College* and *Clare Hall*, in the said university, in being at the time of founding the said college, should prescribe, direct, and appoint; and that immediately after founding and incorporating such college or body collegiate, the trustees and their heirs should stand seised of all the manors, lands, &c., in trust for the said collegiate body and their successors for ever; and as to the manors, &c., wherein the testator was possessed for years, he declared that the trustees should stand possessed thereof: in trust from time to time to

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(q) 3 Ves. jun. 714; see also *Att. Gen. v. Ironmongers' Company*, 2 Myl. & K. 576, aff.; 10 Cl. & Fin. 908, and *Att. Gen. v. Bishop of Landaff*, cited 2 Myl. & K. 586; *Bennett v. Hayter*, 2 Beav. 81; *The Incorporated Society v. Price*, 1 J. & Lat. 498; *Att. Gen. v. Glyn*, 12 Sim. 84.

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assign the same, to such person or persons as should be entitled to the actual possession of his lands of inheritance, by virtue of the limitations aforesaid; and he gave all his goods and chattels to Sir *J. G. Downing*, and appointed him executor. The testator died on the 20th of *June*, 1749, without issue: leaving Sir *J. G. Downing*, his heir-at-law, who entered upon the freehold, copyhold, and leasehold estates of the testator, and enjoyed them till his death in 1764. All the trustees died in the life of the testator. Sir *J. G. Downing*, by his will, in *August*, 1763, gave to his wife, Lady *Downing*, charged with the payment of several annuities and legacies, all his manors, &c., and personal estate, absolutely, and appointed her sole executrix. Lady *Downing* entered upon all the freehold, leasehold, and copyhold estates, devised by Sir *George Downing*. Upon the 9th of *May*, 1764, the information was filed against Lady *Downing* and the heirs-at-law of Sir *J. G. Downing*, and the other proper parties; praying, that the will of Sir *George Downing* might be established, and the trusts carried into execution; that an account might be taken of the money received by Lady *Downing* from the rents and profits of the freehold, copyhold, and leasehold estates become due, after the death of Sir *J. G. Downing*, and for a receiver. The cause was heard on the 19th and 27th of *May*, and the 18th of *July*, 1767, before the Lord Chancellor, assisted by the Master of the Rolls, and Lord Chief Justice *Wilmot*, who, upon the 17th of *June*, 1768, declared their unanimous opinion, that the trusts of the charity ought to be executed, if the King would grant a charter to incorporate the college, and a license for such incorporated college to take the devised premises in mortmain. The cause was farther heard before the Chancellor, who, on the 3rd of *July*, 1769, decreed, *inter alia*, that the will and codicil were well proved, and ought to be established, and the trusts performed, particularly of the charity, in case the King should grant a charter to incorporate the college, and a license for it to take the premises in mortmain; and the defendants, the testator's heirs-at-law, were to be at liberty to apply to the Court for that purpose; and his Lordship decreed a reference to the Master, to inquire, what was the annual value of the premises devised to the charity, to enable the heirs-at-law to form a judgment what number of fellows and scholars could be maintained by the endowment, and that they were to be at liberty to contract for a piece of ground within the University of *Cambridge*, whereon to found the said college, conditionally, in case the charter and

license should be granted by the Crown. Upon a subsequent report of the Master, the cause eventually came on before Lord *Loughborough*, C., who observed, "This is an application to me upon several different grounds on different branches of the case.

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The cause is set down for further directions upon the report of the Master. The directions prayed are for liberty, or an express direction, and authority to the trustees, the heirs-at-law, the persons delegated by the Court to be active in the trust, to lay a proposal before the Master for a plan of a college. But little objection was taken to that in the argument; and it is very much of course in such a case, the Court having declared the will well proved; and that the trusts ought to be performed and carried into execution. The necessary consequence of such a decree is, that, when it is settled, as it came to be in this cause, who are to be active, it being a matter of doubt at the time, but the decree having fixed the heirs-at-law with it, that is, the heirs as they come into possession, the Master might, I think, have received a proposal without a direction; but I believe, in the Master's office, the course is not to act without a specific direction. Therefore, I have no difficulty in giving that direction:" and with respect to the claim set up, on the part of the representatives of Lady *Downing*, to intermediate rents and profits from the death of Sir *George Downing*, up to the time when the college should be incorporated with licence to hold in mortmain; his Lordship continued, "Upon looking at the decree, the trust by the decree here, is as emphatical a trust of the rents and profits as of the land, for the purpose as soon as may be, of purchasing the ground and building upon it; and part of the trust which the Court has declared good, is to obtain a charter and licence. The case would have been exactly the same, supposing the devise had been to an existing college, but which had exhausted its licence to hold in mortmain; for until that licence had been extended on the part of the Crown, the college, having no power to hold in mortmain, could not have taken any legal interest in the land. It can hardly be imagined, that the rents and profits accruing between the death of the testator, and the time the right to hold in mortmain was *de facto* granted by the Crown, would go to the heir. The decree declares, that the trusts of the will ought to be performed and carried into execution; then the specific trust for the creation of the college is suspended, until the Crown thinks fit to grant the charter; but the language of the decree, and if it wanted a comment, the judgment of every one of the Judges shew, it is a good devise

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to charity. According to the will, the arguments of all the Judges, and the number of cases referred to, the right of the heir is totally gone. The decree has not said, that the particular trust failing, the will is void. The King may appoint it to another purpose. It will be necessary to give many particular directions as to the appointment of a receiver, also as to directing the account; for though in positive right I am bound to say these rents and profits do not belong to the persons who have been in possession of them, and I am bound to call for the rents and profits, to take care of them, and in the case of a charity I cannot act upon the ground, that any person has been guilty of laches, nor give the advantage to the defendants, that in other cases I should be urged to do, as the benefit from the length of time, &c.; and though it has happened in many cases, that the Court has been obliged to follow the assets, at great inconvenience and great hardship to the parties, as upon that singular will of Mr. *Travers*, when I was obliged to make a very harsh decree upon those who held the assets for a long time, yet I wish I could satisfy myself, that there was any shorter and more limited period, from which to date the account. I have found extreme difficulty in making it anything less than the strict right calls upon me to do. I wish, therefore, to suspend that part of the decree, and without pronouncing the particular directions, I will consider what order I can frame for the appointment of a receiver, in which the directions must be special, and also for the account of the rents and profits. Declare that the trustees shall be at liberty to lay a plan before the Master for founding and establishing a college according to the directions of the will. Let the Master consider of such plan, and report upon it. Let all the parties have subsequent costs." In *March*, 1800, the cause was again brought forward (*r*), to obtain the directions which were suspended by the above decree, for an account of the rents and profits. Since the decree, the application to the Crown for a charter, having been renewed, was referred to the privy council, who reported that it was proper the charter should be granted, but they declined specifying the number of fellows, &c., till the amount of the arrears of the rents and profits should be known. A plan of the college proposed had also been approved by the Master, and a contract for the purchase of a piece of ground in the University of *Cambridge*. Under these circumstances, the principal direction prayed, was

an account of the rents and profits against *Whittington* the executor, and Sir *George Bowyer* the residuary devisee and legatee of Lady *Downing*, which the relators were desirous of confining to six years. Lord *Loughborough*, after expressing a doubt, whether he could confine the account within that period, having decreed that they belonged to the intended college, at length consented to make that decree, upon an Act of Parliament being obtained to confirm it.

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In the case of the *Attorney General v. Lord Lonsdale* (s), Sir *John Leach*, V. C., directed an account for rents and profits from the commencement of the term of six years before the filing of the information.

But, as an exception to the rule of the Court illustrated in the preceding cases of the present section, we next observe, that where the testator's view is confined to the *sole* purpose of establishing and supporting a *particular charity* which cannot take effect, the particular mode will be considered as *of the essence* of the bequest, and the Court of Chancery will *not* apply the funds bequeathed to any other charitable purpose, but the legacy will be *void*. Thus, if the devise were of houses for the habitation of a number of indigent persons, and a yearly sum of money provided for their support, as the devise of the houses and the specific charity could not take effect by the operation of the Statute of Mortmain, so the annual stipend depending upon it would fall to the ground.

Exception, where particular charity named is of the essence of the gift, and cannot take effect, it will not be executed *cy pres*, but the bequest will be void.

In *Attorney General v. Bishop of Oxford* (t), *Thomas Sims* bequeathed the residue of his personal estate to his executors, in trust to apply the same to *build a church at Wheatley*, where the chapel now is, in such manner as he should thereafter direct, and for want of such direction, as his executors thought best. The information prayed a general account and directions touching the plan and execution of the charitable bequest. The Bishop of *Oxford*, as patron and parson of *Cuddesden* in which *Wheatley* was, and the chapel and chapelwarden opposed the design of building the church, unless the surplus of the residue should be applied in augmentation of the endowment of the chapelry annexed. The next of kin insisted that a new church or chapel must be built, and the surplus (if any) divided amongst them. Sir *Lloyd Kenyon*, M. R., observed, that if the Bishop objected he could not interfere in the matter; as to repairing he could

(s) 1 Sim. 105; see also *Att. Gen. v. Dean, &c. of Christchurch*, 1 Jac. 474.

(t) 1 Bro. C. C. 444, notes.

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not do that. The intention must be implicitly followed or nothing could be done. He, however, referred it to the Master to take an account, and to make a special report as to the plan of erecting a new chapel and the expenses attending it (u): and it was ordered, that the defendants, the Bishop, &c. did signify, whether they were willing, that the residue of the testator's personal estate should be laid out in building a church at *Wheatley* where the chapel then stood, with liberty to lay a plan before the Master, how the residue might be most beneficially applied according to the will of the testator. Before the cause came on again many transactions had taken place. The next of kin and the persons entitled to the benefits under the will, the parishioners acting by the Bishop and their wardens came to an agreement that 3,000*l.* part of the residue of the testator's personal estate, should be applied for the purpose of building a new church and forming a fund for keeping it in repair, and 1,000*l.* other part thereof, should be applied towards augmenting the minister's salary; and that 4,000*l.* being paid for the purposes aforesaid, the residue should belong to the next of kin. This agreement was recited in the decree made in a subsequent stage of the cause, which decreed the residue to be applied accordingly. In commenting upon this case, Lord *Alvanley*, M. R. in *Corbyn v. French*, says, "This decree is perfectly decisive, that the object not being capable of taking effect, the fund could not be applied to any other charitable purpose. The Court could not have made the decree, unless they thought the residue was not applicable to any other purpose. I will not say it could not have been applied for repairing or sustaining the chapel, and I doubt whether Lord *Kenyon* said so. But beyond that purpose or after satisfying it, this is decisive, that it could be applied to no other purpose; for if it was applicable for any other general charitable purpose, or any other purpose for the benefit of that parish, except of the nature pointed out, that decree could not have been justified."

Again, in *Attorney General v. Goulding (v)*, *Hannah Allen*, by will, in 1782, bequeathed as follows: "To *John Bailey*, for his life, all the rents which shall arise from my nine houses-freehold in *Vine-yard*, *Tooley-street*, my leasehold in *Park-street*, two houses at Nos. 42 and 43, *Queen-street*, *Park*, and my houses in *Kennington-road*, in *Kent-street*, one house at *Walworth*, by the turnpike. At the death of *John Bailey*, I give my nine houses

(u) The report of the case from *Corbyn v. French*, 4 Ves. 431.
this stage of the cause is stated in (v) 2 Bro. C. C. 427.

in *Vine-street*, to eight poor people that have paid most and longest to the poor's books in *St. Mary Overy's* parish, as the books shall prove, the corner house to repair them. I give to *John Bailey*, my leasehold house the corner of *Parsonage-walk*, *Newington Butts*, for his life; and the dividends of 800*l.* in the four *per cent.* Bank annuities, at the death of *John Bailey*, I give to the eight houses for ever; to each house 4*l.* every year for ever, as the Bank pays the dividends. I give to the poor of *St. Mary Overy's* parish, all the rents that shall arise on my leasehold in *Park-street*, by the *Borough*, *London*, two in *Queen-street*, Nos. 42 and 43, in the *Park*. I give to such poor as paid most and longest in the parish, thirty half-peck loaves, thirty sacks of coals, and thirty half-guineas, to those thirty poor folks, to be paid there at *Michaelmas* and *Midsummer*; what is left to be given to the poor in smaller sums." The testatrix appointed the defendants executors, and gave them 50*l.* each for their trouble; but she made no disposition of the residue of her personal estate, save as aforesaid. *John Bailey*, having received the dividends of the stock during his life, died in 1787, having made his will, by which he gave the residue of his personal estate to the defendants equally, and appointed them executors. The information prayed, that it might be declared, that the bequest of the interest and dividends of the 800*l.* four *per cent.* annuities to charitable purposes, was a good and subsisting bequest for the benefit of poor persons of that parish, or for some other charitable purpose for the benefit of the parish; and that the residue of the testatrix's personal estate was by her will given for the poor of the said parish, and prayed the consequential accounts; and that the defendants might pay over the dividends since the death of *John Bailey*, and pay the savings and dividends, or transfer of the Bank annuities, and make the distribution of coals directed by the will, and account for the residue of the testatrix's personal estate. But the defendants denied that the interest of the 800*l.* was a good and subsisting bequest; the bequests being attached to the nine freehold houses, and therefore void by the Statute of Mortmain, and submitted that the residue was not void; and they claimed all such interest as *John Bailey* would have had in the personal estate. Justice *Buller*, for the Lord Chancellor, in giving judgment said; "The questions are, whether the gift of the 800*l.* can be supported? For this purpose it is argued not to be within the statute. With respect to the houses, the gift of them is void; then, if the gift of the 800*l.* cannot be applied according to her disposition, another question arises,

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whether the Court is to apply it to some other matter *ejusdem generis*. The Court has certainly thought it could vary the use, but the rule may be drawn from the cases, that wherever the Court had directed the sum given to be applied to a different use, there has been proper ground for the Court to say, the use to which it has been applied, is consistent with the use declared in the will; but there have been subsequent cases which have varied the rule; where, according to the intention of the testatrix's applying the fund otherwise than to the persons inhabiting the houses, would be contrary to that intention, the inhabitants of the houses being the principal objects of bounty, if they cannot be supported, it is not to be given to the poor in general. The second question is, whether the testatrix has given the residue to the poor; it is impossible to put any other construction than that of the defendant's counsel; the small sums given are out of a particular estate. In expounding the words of the will, it is necessary to take the whole of the will together. The testatrix begins every new sentence with the words, *I give*, this helps on to the true sense of the will. The words, 'at the death of *John Bailey*, I give the rents, &c.,' are all one sentence. Mr. *Hollist* contends it ought to be divided, but the Court will not divide it unless it is necessary. The words, *I give*, will occur twice in the sentence either way; *what is left*, only signifies what is left of that subject." The bill was dismissed.

The case of *Grieves v. Case* (*w*), comes next in order; but as it is stated at length in a former section, the reader is referred to it in that place (*x*).

The next case is *Attorney General v. Whitchurch* (*y*), there *Thomas Cooksey* devised four tenements to the churchwardens and vestrymen of the parish of *St. Martin's Sarum*, "in trust for them to give to such poor men of this parish, as they think fit; if any of the descendants of *John Janneway*, formerly of this parish apply, I desire, that they may be preferred to have it; and as I intend these four houses to be in the manner and custom of almshouses for men and their wives, I give and bequeath to the churchwardens and vestrymen of this parish of *St. Martin's Sarum*, the sum of 2,000*L*, that is to say, in the four *per cent.* government securities, in special trust for them to dispose of the interest in the following manner, (that is to say), my will is for them to give or allow to each of the four persons, that they allow

(*w*) 4 Bro. C. C. 67; 1 Ves. jun. 548.

(*x*) *Supra*, p. 1145.

(*y*) 3 Ves. 141.

or permit to inhabit the four houses, the sum of 13*l.* *per annum*, or five shillings a week, to be paid weekly, monthly, or at their discretion; that is, for a man and his wife: if one of them die, the single one to have three shillings and sixpence a week, and not permitted to bring in a second husband or wife." The testator then gave the remainder of the interest to other charitable purposes; to which there was no objection. He appointed executors, but made no disposition of the residue. The testator afterwards having placed in the four tenements four of his relations, by a deed in *December*, 1792, conveyed the four tenements to trustees for such charitable purposes as aforesaid; particularly directing, that, the four tenements should for ever after be held and used as almshouses, to be at all times occupied by four poor men and their wives, to be chosen and placed therein as in the deed mentioned; but he directed, that upon all occasions persons descended of *John Janneway*, formerly of that parish, should be preferred thereto. The deed was duly enrolled in the Court of Chancery, in *January*, 1793. The testator died in *September* following. The information prayed that the bequest of the 2,000*l.* stock might be established, and the fund transferred to the relators to be appropriated according to the intention of the testator, or as nearly thereto as the circumstances might admit; or otherwise that it might be declared to what extent the bequest was good. It charged, that if so much of the bequest of 2,000*l.* stock, as related to the persons to be inhabitants of the four tenements, was void, yet the plaintiffs were entitled to the benefit thereof for their lives as a personal bounty to them. It was observed by Lord *Alvanley*, M. R., "Upon this charitable disposition, it was contended, that though it must be admitted, that the gift of the four tenements is void by the Statute of Mortmain, yet the other part, so far as it concerns the 2,000*l.* stock, appropriated for the maintenance of the poor men and women, may be supported, as not being essentially connected with or belonging to it, but as denoting a general intention; which though the rest fails, may remain and be fulfilled. With regard to the principles, upon which this Court has administered charities, where the same cannot be carried literally into effect, I refer and adhere to those principles, which I laid down as the rule, by which I conceive this Court ought to govern itself, in the *Attorney General v. Boulton* (z). A charitable bequest cannot be defeated, by the negligence or default of the person to administer it, or by the

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(z) *Supra*, p. 1206.

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impossibility to give effect to every circumstance. If the general intention appears consistent with the rules of law, and not against the Mortmain Act, it shall be carried into effect without regard to the secondary objects, which the testator might have intended. The doctrine of *cy pres*, which has been so much discussed in this Court, and by which I understand the rule to execute the charitable intention as nearly as possible, however wildly and extravagantly it has been acted upon in former cases, is by late decisions, particularly since the statute, administered in this way. The Court will not administer a charity in a different manner from that pointed out, unless they see, that though it cannot be literally executed, another mode may be adopted, by which it may be carried into effect in substance, without infringing upon the rules of law. If the mode becomes impossible, the general object, if attainable, shall not be defeated. It remains to apply these principles to see, whether there is any intention to give this fund to the general purpose of providing for poor men and women, independent of the almshouses, or whether an endowment only is proposed by the appropriation of part of the interest to that. In that view it must be admitted that it must fail. The *Attorney General v. Goulding* (a) is almost precisely in point. It is said, an intention to give this provision to any poor men and women may be collected. If I could collect that intention, I would execute it: but I cannot; and so it is not enough to say, it is not inconsistent with that intention, or that if the testator could have foreseen the failure of his object, he would have given it to poor men and women without regard to the houses. Perhaps he would: but can I judicially pronounce, that he would; or, (for such is the office of a Judge,) can I fairly infer that he would upon this will? I cannot. An endowment, with a restriction as to another wife or husband; an endowment, where the conduct of the parties is under the control of the trustees, is very different from a charity for poor men and women in general. I cannot create another charitable object for him, or apply this to any different object so as to be warranted in saying, I fulfil the intention." His Lordship declared, that under the true construction of the will, the intention was to make an endowment of almshouses; that there was no general intention beyond that; and therefore the bequest, so far as it concerned those almshouses, must fail with the object, to which it was attached.

The *Attorney General v. Davies* (b), and *Attorney General v.*

(a) *Supra*, p. 1222.

(b) *Supra*, p. 1172; 9 Ves. 535.

Hinzman (c), fall within the present line of cases now under consideration; and which it is unnecessary to state here, as they are detailed in former pages of the present Chapter, to which the reader is referred.

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We shall conclude the subject under discussion with the case of *Limbrey v. Gurr* (d). In that case the testator made a grant of land which was void under the 9 Geo. 2, c. 36, there being a resulting trust for the life of the grantor. By his will he gave 7,000*l.* stock among other things upon trust to build eight houses on the land in question; and a further sum of 8,000*l.* upon trust to pay certain sums weekly to poor persons who appeared to be the same that were intended to reside in the almshouses, and for repairs, &c. In a testamentary paper making an estimate of the expenses of the building, &c., the testator calculated there would be a sum of 1,600*l.* remaining to be applied upon the purposes of the 8,000*l.* Sir *John Leach*, V. C., held the bequests of 7,000*l.* and 8,000*l.* as to such parts thereof as related to the almshouses were void; as the almshouses could not be built and those bequests were inseparably blended with the gift that had failed; and that the gift of the residue must also fail because that was incapable of being ascertained except by the actual execution of the prior purpose.

7. We proceed with a *seventh* class of cases, wherein certain objects are *specified*, and the fund bequeathed to charitable uses is *more than sufficient* to answer the purposes intended; the surplus will not belong to the next of kin, but the Court will in like manner undertake the application of it in a way, though not in express terms directed by the will, yet in furtherance of the general intention.

7. Where charitable objects are specified, and fund more than sufficient.

Thus in the case of the *Bishop of Hereford v. Adams* (e), *George Jarvis*, by will, in 1790, among several legacies, bequeathed the sum of 30,000*l.* to the Bishop of *Hereford* for the time being, and other trustees upon trust to invest that sum on government securities, and apply the interest or dividends of 11,000*l.* part of the principal money, among such number of the poor inhabitants of the parish of *Stanton upon Wye*, in the county of *Hereford*, at such times, and in such proportions, and either in money, provision, physic, or clothes, as his trustees, or the

(c) *Supra*, p. 1142; 2 Jac. & Wal. 270; see *Att. Gen. v Lord Lonsdale*, 1 Sim. 107; *Cherry v. Holt*, 1 Myl. & Cr. 123.

(d) *Mad. & Geld*. 151.

(e) 7 Ves. 324; see *Thetford School case*, 8 Rep. 130, and *Arnold v. Att. Gen.* Show. P. C. 22; *Att. Gen. v. Drapers' Company*, 2 Beav. 508.

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majority of them, should think fit, for the better support and maintenance of such poor inhabitants: and the dividends, &c. of 13,000*l.* also part of the said securities, among the poor inhabitants of the parish of *Bredwardine*, in the county of *Hereford*; and the dividends, &c. of the remaining 6,000*l.* among the poor inhabitants of the parish of *Lettor*, in the same county, with similar directions for the application of those funds. The residue of his property the testator gave to the same trustees, upon the same charitable trusts as above mentioned, and confirmed his will by two codicils. It was insisted by Lady *Twisden*, the next of kin of the testator, that the legacy of 30,000*l.* was void; but by the decree both the trustees and Lady *Twisden* were permitted to submit proposals to the Master for a scheme. By the Master's report it appeared, that the funds provided by the will, for the support of the poor of these parishes, consisted of 66,715*l.* 2*s.* 9*d.* Bank three *per cent.* consols; 603*l.* 12*s.* 8*d.* five *per cent.* annuities; 4,024*l.* 4*s.* 4*d.* Bank stock, and 12,201*l.* 6*s.* 3*d.* cash. That in the parish of *Bredwardine*, the number of poor inhabitants who received alms amounted to thirty; of the poor inhabitants who did not receive alms to one hundred and eighty-seven. The non-resident inhabitants having legal settlements were sixty-six, and the poor rates 185*l.* a year. That in the parish of *Stanton*, the poor inhabitants receiving alms were seventeen; those not receiving alms, two hundred and sixty-two; the non-resident parishioners having legal settlements, sixty-one; and the poor rates, 225*l.* That in the parish of *Lettor*, there were no poor inhabitants receiving alms, those not receiving alms, forty-four; the non-residents having legal settlements, nine, of whom eight received alms; and the poor rates, 85*l.* a year. That the proposal of the trustees, calculating the income of the parish of *Bredwardine* at 1,003*l.* per annum, was, for physic and attendance to the poor, 50*l.*; clothing, bedding, and bed-clothes, 330*l.*; fuel, 135*l.*; food, in the manner stated in the report, 281*l.* 6*s.*; payments for schooling, 60*l.*; payments to apprenticing poor children, 60*l.*; proportion of the salary of an agent, 25*l.*; occasional gratuities to servants and apprentices conducting themselves well, 61*l.* 14*s.* The proposals as to the other parishes were similar, in proportion to their difference of income. Lady *Twisden*, the next of kin, proposed, that the annual sum of 1,156*l.* 13*s.* 4*d.* should be apportioned among the poor of the three parishes for the purposes of the will, as being amply sufficient; and that the residue should be paid to her. The Master having approved the proposals of the trustees, Lady

Twisden excepted to the report, and contended, that the Court would not establish so mistaken a charity, which was in effect a premium to idleness; but if the Court should be of a different opinion, then that after the specific provisions by the will were answered, there would be a large surplus, which the trustees could not dispose of according to any intention of the testator. Lord *Eldon*, in giving judgment said: "The plan of Lady *Twisden* is liable to many of the objections capable of being made to the other; and as to giving the surplus to her, it is impossible in the present state of the record; for such purpose cannot be said to be part of a plan for distributing in charity according to the testator's will. Her claim must be on the ground, that the object aimed at is impracticable in fact, or, which is the same thing, in law; and that, the property being undisposed of, she is entitled as next of kin. As to the plan of the trustees, I have nothing to do with arguments of policy. If the Legislature think proper to give the power of leaving property for charitable uses or purposes, recognised by the law as such, however prejudicial, the Court must administer it. If it be right to put bequests of personal property to charity under the same fetters as real estate, that is for the Legislature; and Courts of Justice must act without regard to the impolicy of the law. It cannot be supposed, that the testator was unacquainted with the state of these parishes, the will being made only three years before his death: if he had been asked as to the particular mode of executing his plan, he would probably have been under as much difficulty as the Court is. In two codicils, he confirms the disposition made by the will. If this can practically be carried into effect in point of law, there is so little objection, that the Court is bound to give it effect. The testator certainly thought so. If that be founded in error, Lady *Twisden* would have more to do to get at the surplus, than to say it could not be practically applied. She must contend that the application to charity must be precisely as it is given by this will: a point certainly not settled, and that could not be settled upon these exceptions. If her claim was grounded, not upon the impracticability, but upon the impolicy of the object, there will be much more difficulty before she gets rid of the *cy pres* doctrine; upon many of the cases, particularly *De Costa v. De Pas* (f), which lately I had occasion to refer to; imputing to the testator a general intention of embalming his memory, as Lord Chief Justice *Wilmot* says. Upon either head,

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therefore, it is open to serious argument, whether she can take it. The Master's report by no means satisfies me, that no plan can be devised which ought to be carried into execution. With a very small variation of phrase, this report itself would give such a plan; and the doubt I have at last is, whether it be fit for the Court to do that in an indirect way, by sending it back to the Master, or to say, that by fair reasoning, what the Master has now proposed is consistent with the intention of the testator, however shortly expressed in the will. As to the time and proportions, he has altogether confided in his trustees, subject to the exercise of a sound discretion to be exercised by this Court: not as to the manner, for that is prescribed by him. I construe it, 'poor inhabitants not receiving alms.' If the word '*money*' alone had been in the will, it could not be said that you could give the money to the poor inhabitant, enabling him to purchase fuel, provisions, and clothes; and that it is misapplied if the trustees procured those necessaries, and with his consent paid for them. It would be strong to make that distinction. The words 'provision, physic, and clothes,' might therefore have been left out of the will. I look upon them rather as designating to the trustees how they were to apply the money, than as actually necessary. It is impossible for me to object to the medicines; the testator having expressly said, money laid out in physic would be a good application; and 50*l.* a year is very little for so many poor families. As to fuel, if the report proposed to advance money for that purpose, it would be directly within the words, and the Court will not disapprove it, if the purposes of the will are secured by the plan. There is no weight, therefore, in that objection to the plan, merely because it does not give the money for that purpose. Then clothes and provision are expressly within the will. As to the last sums in the report, I agree, that the money is proposed to be disposed of in a more useful way than any other. The question is, whether, in the fair sense of this will, if money be given to a schoolmaster, to teach a poor boy reading and writing, that is an abuse of the charity, or an advance of money within the intent and meaning of the will. It is very erroneous to say, that which may tend to make it unnecessary to advance to that boy or his parents money, provision, or clothes, in future, was advanced contrary to the will; the advance being made to the intent that he should have that education which would enable him to get his own bread, and maintain his parents. But Lady *Twisden* the next of kin, has no interest in that question; for if that would be wrong, it might be divided among the others,

so as to disappoint her. Next, as to apprenticing: suppose the master, for a small fee, covenants to maintain the boy; would it be contrary to the fair exposition of such a will to advance that money to that person, to relieve the trust from an application from time to time according to the trust. If the money were given to the boy himself, and he was to pay it as an apprentice fee, that would be within the will; and the only alteration of the report would be in that respect; and I will not send it back to the Master for that. Perhaps the best plan would be, to apply, according to their own notions, from time to time; laying their account of it annually before the Master: but I cannot lay trustees under those difficulties. Unless, therefore, Lady *Twisden* can lay before the Court a plan, under which she can contend for a distribution of the property, as to part of it, upon this principle, that the testator has not given it away, she is not very usefully for herself or the charity contending, whether a payment of money for the benefit of a poor person is, within the strict letter of this will, a payment to that poor person. It is best, therefore, upon the whole, to confirm the report; declaring that I do it, conceiving the plan therein contained agreeable to the true construction of the testator's will."

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So in the case of *Attorney General v. Earl of Winchelsea (g)*, the Rev. *Robert Chapman*, by his will, in 1783, gave the residue of his personal estate to the Earl of *Winchelsea*, and other persons, upon trust, with all convenient speed after his death, to place out and continue the same at interest, in their joint names, in the public funds or upon parliamentary security, and not on any real security; and should from time to time, yearly for ever afterwards, out of the dividends, interest, and produce of such residue, pay, by equal half-yearly payments, at the feast of the Annunciation and *St. Michael*, unto a proper schoolmaster, (to be appointed by the trustees, or the major part of them, or the successors), 12*l.* clear of all taxes, &c., for the teaching and instructing all the children of *Ravenstone*, for the time being, to read, write, cast accounts, and say their *Catechism*, at some proper convenient place in *Ravenstone*, which he earnestly recommended to the said Earl to appoint for that purpose, not doubting his inclination to do anything in his power to further the testator's intention in the matter: and also that the trustees should every year, out of the dividends, &c., lay out twenty shillings in the purchase of such books, as they should think proper, for the use

(g) 3 Bro. C. C. 373; S. C. 2 Cox, 364, *nomine Att. Gen. v. Hurst*.

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of the children of the school; and also yearly, for ever, apply the surplus of the dividends, &c., if there should be any after such payments, in clothing and putting out apprentices to any trade, business, or occupation, which should be thought proper, two children of the parish of *Ravenstone*, and one child of the parish of *Little Woolstone*: and he directed that his trustees should meet at least once a year at *Ravenstone*, and inspect the management of the school, and settle and audit the accounts of the charity; and he appointed the defendants *Dering* and *Hurst* executors. The testator died in *October* 1785, possessed of a considerable personal estate, without leaving wife or children, or any other next of kin, than the defendant *Mrs. Chapman* his only surviving sister, and the defendant *R. Daniel*, his nephew. The information prayed, that the charitable bequests might be established, and that after taking the usual account of the testator's assets, the residue or clear surplus of the personal estate might be ascertained, and paid to the defendants the trustees, to be placed at interest upon government securities in their names; and that the dividends might from time to time for ever be applied for the charitable purposes mentioned in his will; and if it should appear that such dividends were more than sufficient to pay the annual allowance of 12*l.* to a schoolmaster, and the yearly sum of twenty shillings for the purchase of books for the use of the school, and the expenses of clothing and providing apprentice fees for the three boys every year; then that the charity might be enlarged, in such manner as the Court might think proper, and that the interest of the whole residue and clear surplus of the testator's personal estate might be applied according to the directions in his will, or as near thereto as the nature of the case and the circumstances would admit. The defendant, *Daniel*, one of the next of kin, insisted, that the surplus of the testator's estate was much more than sufficient to answer all the charitable purposes; and that a considerable part of the residue consisted of *mortgages*, or some other real securities; and that, so far as the disposition of the residue related to such securities, the same ought to be declared void; and he submitted whether, as one of the next of kin, he was not entitled to a distributive share of such residue. The other next of kin, *Mrs. Chapman*, disclaimed having any interest in the residue, being desirous that the charitable bequests should be established. The executors admitted that the residuary personal estate was of a considerable amount, part of which consisted of two mortgage securities, one of 200*l.*, which had been paid in since the testator's death, and another of 2,000*l.* then

outstanding. The trustees submitted, that as the residue was more than enough to answer the precise number of objects particularized in the will, the charity ought to be enlarged. The cause was heard in *June*, 1790, when it was referred to the Master to take the usual accounts, and to state of what the testator's personal estate consisted; subsequent to the decree, and prior to the report, Mrs. *Chapman* assigned all her interest in the mortgages, and the residue of the testator's estate, to the trustees for the benefit of the charity; in consequence of which a supplemental information was filed, and the cause came on again in *November*, 1791. In giving judgment, Lord *Alvanley*, M. R., observed: "The question is, whether the whole surplus of his personal estate is not intended to go to the charitable purposes mentioned in the will, though more than sufficient to answer the exact number of objects there specified. The real intention of the testator is perfectly clear, that he meant to give the *whole* surplus. It has been said, that the distinction is, that where there is a definite object, and that cannot take place, the Court will not look for another object, but let the property go to the next of kin, or the heir-at-law:" in support of which observation, his Honor cited the cases of *Attorney General v. The Bishop of Oxford* (*h*), and the *Attorney General v. Goulding* (*i*), and then continued; "But wherever the intention has been, to dispose of the whole property to certain purposes, as in the early case of *Thetford School* (*j*), and numerous subsequent authorities, the whole has been applied: the intention has been considered as such, and it has been only inferred, that the testator has been mistaken merely as to the *quantum*. It has been observed, as a strong mark of his intention, that by giving the apprentice fees to three objects, he has marked out the limits of his bounty, and that the confining it to that number will be a sufficient compliance with his intention: but according to the disposition of this residue, his intention could not be limited to three boys, and if it would pay more, the testator has shown an intent, that the surplus beyond that must be applied in the same manner; therefore, I am of opinion, it must be applied to the charitable purposes mentioned in the will: perhaps it may not turn out to be much more than sufficient, but if it should, the next of kin may then come to the Court, as in other cases, where there has been an increase of rents and profits (*k*).

Construction of charitable bequests, and administration of the fund.

Charitable objects named, and fund more than sufficient.

(*h*) *Supra*, p. 1221.

(*i*) *Ib.* p. 1222.

(*j*) 8 Rep. 130.

(*k*) Also *Att. Gen. v. Skinners'*

Construction of charitable bequests, and administration of the fund.

Charitable objects named, and fund more than sufficient.

It seems to be settled by the decision in the case of *Attorney General v. Bowyer* (l), and the authorities there referred to, that if lands be devised to a use good in itself, though not capable of taking effect immediately, as to found a college, the charter and license of the Crown being necessary, the intermediate rents between the death of the testator and the period of founding the college, will not belong to the heir, as a resulting trust, but will be considered the property of the college (m).

But if part of the produce of lands be devised to a charity, and the residue of the produce to other persons, so much as was given to the charity will belong to the heir (n).

In the preceding class the whole fund was applicable to charitable objects named, and, being more than sufficient, the Court of Chancery undertook its application, though not according to the express terms of the testamentary disposition, yet in furtherance of the general intention of the donor: the following case, forming one of another class, is distinguishable in the circumstance, that a specified amount, devoted by the testator to the charitable purpose, is charged upon a larger fund, the surplus of which was given to other objects; and the fund so charged having greatly increased in value, the question was, whether the amount of the charitable gift should not be increased in proportion to the increase of the annual value of the property upon which it was charged, and which depended upon the construction of the bequest.

The case is that of *Yordon's* charity (o), where the testator, by will, in 1468, devised an estate to the Fishmongers' Company and their successors, and willed that the wardens of the company should buy and deliver 138 quarters of coal, or else money to buy with the same coals unto the same number, after the price of eightpence per quarter, which at the aforesaid price amounted to the yearly sum of 4*l.* 12*s.*: the testator then directed the coals to be distributed in certain proportions to certain poor inhabitants of parishes named; and if the coals were bought for less price, then more coals should be given: and he gave the wardens

Company, 2 Russ. 407; *Att. Gen. v. Mercers' Company*, 2 Myl. & K. 654, and see *In re Upton Warren*, 1 Ib. 410; *Att. Gen. v. Holland*, 2 Yo. & Coll. (Ex.), 683, and the cases cited in the next sub-sect. 8.

(l) *Supra*, p. 1217.

(m) See also *Att. Gen. v. St.*

Catherine's Hall, 1 Jac. 380.

(n) *Gibbs v. Rumsey*, 2 Ves. & Bea. 294, *supra*, p. 455.

(o) 5 Sim. 571; also *Att. Gen. v. Skinners' Company*, Ib. 596; *Att. Gen. v. Corp. of Wisbech*, 6 Jurist, 655.

of the company and their successors forty shillings yearly for their trouble in the distribution, (that is), each of them 6s. 8d.; adding, "whatsoever leaveth over mispent of the said residue, I will that it be disposed yearly and for evermore, to the reparations maintaining, upholding and sustaining of the aforesaid rents, and to the most necessary and profitable use of the said company. The price of coals having greatly increased, the company distributed among the poor of the specified parishes sums amounting to 4l. 12s., instead of coals: the rents of the estates increased, and the questions were, 1st. whether the company were not bound to distribute coals only; and 2ndly, whether, if they had the option of distributing either coals or money, the 4l. 12s. ought not to be increased in proportion as the rents of the estate had increased. Sir *L. Shadwell*, V. C., was of opinion, that the testator intended to give the company the option of giving either coals or money, not exceeding the 4l. 12s., but that there was nothing in the will which indicated an intention that the poor should take more than that sum. Upon the second question, his Honor considered the principal case not within the *Thetford School case* (p), and *Arnold v. Attorney General* (q), for there the whole estate was given for charitable uses; but that in the principal case, subject to the definite sum mentioned, the surplus should go for the benefit of the company (r).

Construction of charitable bequests, and administration of the fund.

Charitable objects named, and fund more than sufficient.

But in the case of the *Attorney General v. The Coopers' Company* (s), a definite proportion only of the income of a property was given to the company, and Lord *Langdale*, M. R., held, that all the objects of the testator's bounty were entitled to participate with the company in the increased income. In that case, the testator devised a house to the Coopers' Company upon condition of their maintaining a school at R., and the rent, which he estimated at 11l., was to be bestowed upon certain objects in different sums amounting to 8l., and among them 5s. to the company, and then he gave 3l., the remainder, to the company to put in their common box, towards repair of the house, if need be. The rents increased to 75l., and the questions were whether, after paying the sums to the charitable objects to the extent of 8l. a year, the company were not entitled beneficially to the surplus, or took it subject to the charitable trusts. Lord *Lang-*

(p) 8 Rep. 130.

(q) Shower, P. C. 22.

(r) See also *Att. Gen. v. Gascoigne*, 2 Myl. & K. 647; *Att. Gen. v. Brazen Nose Coll.* 2 Cl. & Fi.

295; *Att. Gen. v. Fishmongers' Co.*,

2 Beav. 151, 5 Myl. & Cr. 11; *Att.*

Gen. v. Grocers' Co., 6 Beav. 526.

(s) 3 Beav. 29,

Construction of charitable bequests, and administration of the fund.

Charitable bequests not within the jurisdiction of the Courts of Chancery.

dale, M. R., held, that the company took a beneficial interest in the property, but that, as the testator meant an apportionment of the whole rent, they were entitled only to three-elevenths subject to the repairs, and were trustees of the remaining eight-elevenths for the charity. His Lordship, after the hearing, thus stated the principles upon which the Court acted in the classes of cases now under consideration. "If the testator clearly declares an intention of devoting the whole income of a property to charitable purposes, then, although he does not, in specifically directing the application of portions of it, exhaust the whole income, still the general intention that the whole shall be applied to charitable purposes will prevail; and, on the other hand, although he does not make any such general declaration of devoting the whole to charity, but gives each and every portion of the whole income at the time to some charitable purposes, and by that means exhausts the whole; then, if the income should afterwards increase, the increase will also be applicable to charitable purposes" (t).

A decision similar to the preceding was made by his Lordship in the case of *Attorney General v. The Drapers' Company* (u).

8. Where charity not within the jurisdiction of the Court of Chancery.

8. We here lastly observe, that where the charity is to be administered out of the jurisdiction of the Court of Chancery, it will not take into its own hands the administration.

In the case of the *Provost, Bailies, &c., of Edinburgh v. Aubery* (v), the devise was of 3,500*l.* *South Sea* annuities to the plaintiffs, to be applied to the maintenance of poor labourers residing in *Edinburgh* and towns adjacent. Lord *Hardwicke*, Chancellor, was of opinion, he could not give any directions as to the distribution of the money, that belonging to another jurisdiction, that is, to some of the Courts in *Scotland*; and therefore his Lordship directed that the annuities should be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will. The same course was adopted in the cases of the *Attorney General v. Lepine* (w), and *Minet v. Vulliamy* (x); where the charity was to be distributed in *Switzerland*; and in the subsequent case of *Emery v. Hill* (y), where the charity was to be administered in *Scotland*.

(t) See *Att. Gen. v. Christ's Hospital*, 4 Beav. 73, and *Att. Gen. v. The Merchant Venturers' Society*, 5 Beav. 338, (now under appeal).

(u) 4 Beav. 67.

(v) Amb. 236.

(w) 2 Swanst. 181.

(x) Reported from Reg. lib. in 1 Russ. 113.

(y) 1 Russ. 112.

SECT. VI. Of Bequests to charity void for uncertainty.

Charitable be-
quests void for
uncertainty in
the amount.

The next section, and which concludes the present chapter, comprises a class of cases, in which the legacies given to charity fail for uncertainty, either of the *amount* intended to be given, or of the uncertain or indefinite *purpose* of charity expressed by the testator.

1. Of the former, the case of *Chapman v. Brown* (z), stated in a former part of the present chapter for another point, is an instance. In that case, the bequest contemplated the surplus that was to remain after a prior gift, void by the Statute of Mortmain: consequently, the gift of the *surplus* failed from the uncertainty of the amount intended to be given, inasmuch as the whole *corpus* of the fund being unaffected by the prior gift, a surplus did not in strictness arise, and there were no means of ascertaining how much the residue would have been.

The testatrix *Elizabeth Brookes*, bequeathed the residue of her real and personal estate to her executors, in trust to build or purchase a chapel for divine service; and if there should be an overplus, then to apply it towards supporting a minister, so as not to exceed 20*l.* annually, and if a surplus still remained, then to lay it out in such charitable uses as they, her executors, should think proper. The dispositions to build or purchase a chapel, and for the support of the minister, being adjudged void (a), the next question was, as to the effect of the ultimate bequest of the residue to such charitable uses, as the testatrix's executors should think proper; and Sir *William Grant*, M. R., thus expressed himself, "I have been a good deal embarrassed as to the ultimate bequest of the residue, to be applied by the executors in general charitable purposes. Standing by itself, the bequest of a residue to be employed in such charitable purposes as the executors shall think proper, is a good bequest; supposing it legal to do as the testatrix had directed, and a residue had been left after those purposes were answered, there would have been a good bequest of it; therefore the question is, whether the ulterior bequest is to fail, because the prior bequest cannot take effect? If it could be reduced to any certainty, how much would have been

(z) *Supra*, p. 1171; 6 Ves. 404; p. 1142; *Mitford v. Reynolds*, 1 Phi. see also *Att. Gen. v. Davies*, 9 Ves. 185; *Thompson v. Thompson*, 1 Col. 535; *supra*, p. 1172, and *Att. Gen. v.* 398.
Hixman, 2 Jac. & Walk. 270, *supra*, (a) *Supra*, p. 1172.

Charitable bequests void for uncertainty in the amount.

employed by the executors for the other purposes, the residue ought to be employed under this last direction : viz. for charitable purposes generally. I have considered whether that can be ascertained by a reference to the Master, to see, how much would have been sufficient for this chapel : but upon consideration, it is impossible to give any direction that would not be vague and indefinite, to a degree almost ridiculous : an inquiry, what they might have employed for building a chapel, without knowing what kind of chapel : the testatrix having given no ground to ascertain what kind of chapel ; no locality ; it is impossible to frame any direction, that would enable the Master to form any idea upon it. If she had even pointed out any particular place, that might have furnished some ground of inquiry, as to what size would be sufficient for the congregation to be expected there. But this is so entirely indefinite, that it is quite uncertain what the residue would have been, and therefore it is void for that uncertainty. She had no view to any residue, but a residue to be constituted by actually building a chapel. She contemplated no residue but with reference to that. It is impossible to ascertain it in the only manner in which she meant it to be ascertained. It is impossible for the Court to apply it. Therefore the whole of the disposition is void."

2. Charitable bequests void for the uncertain or indefinite purpose.

2. Of those cases void for the uncertain or indefinite character of the charitable purpose expressed by the testator, the first case is *Browne v. Yeall* (b). There *Ralph Bradley*, by will, in 1788, directed the proceeds of certain trust monies to be from time to time for ever applied by his trustees, "in the purchasing of such books as, by a proper disposition of them under the following directions, may have a tendency to promote the interests of virtue and religion, and the happiness of mankind, the same to be disposed of in *Great Britain*, or in any other part of the British dominions ; this charitable design to be executed by and under the direction and superintendency of such persons, and under such rules and regulations, as by any decree or order of the High Court of Chancery, shall from time to time be directed in that behalf:" and Lord *Thurlow* determined that the bequest was too indefinite for the Court to execute.

The next case is *Morice v. The Bishop of Durham* (c). In that case, *Ann Crackerode*, by her will, in 1801, bequeathed the

(b) Cited in note 7 *Ves.* 50 ; see per Lord *Eldon*, 10 *Ves.* 27.

(c) 9 *Ves.* 399 ; 10 *Ves.* 522, 539.

residue of her personal estate to the Bishop of *Durham*, his executors, &c. upon trust to pay her debts, legacies, &c. and to dispose of the ultimate residue to such objects of benevolence and liberality, as the Bishop of *Durham* should most approve of; and she appointed him her sole executor. The bill was filed by the next of kin, praying, among other things, that the residuary bequest might be declared void. Sir *William Grant*, M. R., in the course of his judgment, said, that it was then settled, that where a charitable purpose was expressed, however general, the bequest should not fail on account of the uncertainty of the object, but the particular mode would be directed by the King in some cases, in others by the Court; that the word "charity," in that Court derived its signification chiefly from the statute of *Elizabeth* (*d*); and he proceeded thus: "Those purposes are considered charitable, which that statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity generally shall be applied. But it is clear *liberality* and *benevolence* can find numberless objects, not included in that statute, in the largest construction of it. The use of the word 'charitable' seems to have been purposely avoided in this will, in order to leave the Bishop the most unrestrained discretion. Supposing the uncertainty of the trust no objection to its validity, could it be contended to be an abuse of the trust to employ this fund upon objects, which all mankind would allow to be objects of liberality and benevolence; though not to be said, in the language of this Court, to be objects also of charity? By what rule of construction could it be said, all objects of liberality and benevolence are excluded, which do not fall within the statute of *Elizabeth*? The question is, not whether he may not apply upon purposes strictly charitable, but whether he is bound so to apply it? I am not aware of any case, in which the bequest has been held charitable, where the testator has not either used that word, to denote his general purpose, or specified some particular purpose, which this Court has determined to be charitable in its nature. All the cases upon that subject are to be found in the report of *Moggridge v. Thackwell* (*e*). *Browne v. Yeall* (*f*), I should have thought a much more doubtful case. There was ground for contending, that the particular purpose specified was charitable in itself, according to the decisions of this Court; and it was described by the testator as a charitable design.

Charitable bequests void for the uncertain or indefinite purpose.

(*d*) Stat. 43, ch. 4.

(*e*) 7 Ves. 36, *supra*, p. 1194.

(*f*) Last page.

Charitable be-
quests void for
the uncertain
or indefinite
purpose.

But here there is no specific purpose pointed out, to which the residue is to be applied: the words 'charity' and 'charitable' do not occur: the words used are not synonymous: the trusts may be completely executed, without bestowing any part of this residue upon purposes strictly charitable. The residue, therefore, cannot be said to be given to charitable purposes; and, as the trust is too indefinite to be disposed of to any other purposes, it follows, that the residue remains undisposed of; and must be distributed amongst the next of kin of the testatrix." The cause was subsequently brought before Lord *Eldon*, C., upon an appeal from the decision of Sir *William Grant*, M. R., who confirmed the decree, and in the course of his judgment observed: "The only case, decided upon any principle, that can govern this, is *Browne v. Yeall*; which applies strongly. I do not trust myself with the question, whether the principle was well applied in that instance: but the decision furnishes a principle, which the Court must endeavour well to apply in cases that occur: I do not hesitate to say, I entertain doubt, not of the principle, upon which that case was decided, but whether it was well applied in that instance. But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word 'charity' in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this Court would have enforced by decree, and reference to a master. *I do not think that was the intention*; and, *if not*, the intention is too indefinite, to create a trust. But it was the intention to create a trust; and the object, being too indefinite, has failed. The consequence of law is, that the bishop takes the property upon trust to dispose of it, as the law will dispose of it; and not for his own benefit, or any purpose this Court can effectuate. I think, therefore, this decree is right."

So in *James v. Allen* (g), *Elijah Waring*, by his will, gave the residue of his personal property to the defendants *William Allen*, *Joseph Allen*, and *William Mathews*, (whom he appointed his executors,) and to their executors and administrators, in trust to be by them applied and disposed of for and to such *benevolent* purposes, as they, in their discretion, might unanimously agree

(g) 3 Mer. 17; *Ellis v. Selby*, 7 and 1 Keen, 274, note; *Nash v. Sim.* 352; 1 Myl. & Cr. 286, and *Morley*, 5 Beav. 177. *Williams v. Kershaw*, cited *Ib.* 293,

on. Sir *William Grant*, M. R., decided, that the bequest was void for uncertainty. His Honor observed; "I certainly did not conceive, that in the case of *Morice v. The Bishop of Durham* (h), it was merely by the addition of the word 'liberality,' that the trust was rendered uncertain, and therefore incapable of being carried into execution. 'Liberality' is, no doubt, distinguishable from 'benevolence,' but benevolence is also distinguishable from 'charity.' For although many charitable institutions are very properly called 'benevolent,' it is impossible to say, that every object of a man's benevolence is also an object of his charity. Nor do I see how the required concurrence of three persons in the selection of the objects does, by any necessity, exclude the appropriations of the property to purposes very different from any that are specified in the statute of Queen *Elizabeth* (i), or that have been held to be within the analogies of that statute. In the case before referred to, it was attempted, in the argument on the appeal, to maintain, that, although the bequest should be held to be void, so far as it was made for purposes of 'liberality,' yet it ought to be considered as good, in so far as it was for purposes of 'benevolence;' which last word, it was said, was equivalent to 'charity.' The Lord Chancellor does not say, that there could not be proportional division, where a bequest was in part only for a charitable purpose, as in the *Attorney General v. Doyley* (j), but holds generally, that no charitable purpose was sufficiently expressed. In that case, as in this, the whole property might, consistently with the words of the will, have been applied to purposes strictly charitable. But the question is, what authority would this Court have to say, that the property must not be applied to purposes, however benevolent, unless they also came within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to executé. I see no substantial difference between this case and the former, and therefore consider the point as already decided, though if it were still open, I should not entertain any doubt on the question."

Charitable bequests void for the uncertain or indefinite purpose.

Again, in the more recent case of *Ommanney v. Butcher* (k), *Buckeridge Ball Ackworth*, after giving various legacies to individuals, and public charities, directed his books, jewels, plate and furniture to be sold, and desiring his linen might be divided

(h) 9 Ves. 399, *supra*, p. 1238.

7 Ves. 58, note.

(i) Stat. 43.

(k) 1 Turn. 260.

(j) 4 Vin. ab. 485; 2 Eq. ab. 194;

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among his servants, to whom he also gave mourning, concluded his will thus: "I desire to be given to Mr. *Ellis*, Mr. *George Ellis*, Mr. *Bates*, and Mr. *Sutherland*, and to my two executors, five guineas each for a ring, as a token of remembrance; in case there is any money remaining, I should wish it to be given in *private charity*." Upon a reference made to the Master, the clear residue of the testator's estate was found to amount to more than was required to pay his debts and legacies. Sir *Thomas Plumer*, M. R., after deciding that the executors did not take beneficially, proceeded thus: "My opinion is, that the testator was adverting to that which he has directed to be converted into money, and that the clause in question does not comprehend the general residue, but must be considered as applying to the residue of the produce of those articles, which the testator has directed to be sold, after providing for the payments which are ordered to be made. Supposing that to be the case, it remains to be considered whether the Crown is to distribute this sum, or whether it belongs to the next of kin. The amount is small, but the principle is considerable: it appears to me that this case falls within the principle of the cases cited, in which there is no object sufficiently definite to give the Crown jurisdiction, or to enable the Court to execute the trust. There is no case, in which private charity has been made the subject of disposal in the Crown, or been acted upon by this Court. The charities recognised by this Court are public in their nature, they are such as the Court can see to the execution of. In this case the difference is obvious; if a party is to execute the purpose of this testator, he cannot give to public charities; the disposition must be confined to private charity. In what respect does private charity differ from benevolence? Assisting individuals in distress is private charity, but how can such a charity be executed by the Court, or by the Crown. In all cases the general principle is, that the trust must be of such a tangible nature, as that the Court can deal with it; when it is mixed up with general moral duty, it is not the subject of the jurisdiction of a Court of Justice. Private charity is in its nature indefinite; how can it be controlled, how can it be carried into execution; as a general purpose of charity, the object of this testator cannot be carried into execution; as a trust, it is not sufficiently specific or definite. The sum in question must, therefore, go to the next of kin. With respect to the case of *Legge v. Asgill* (1), the testatrix in that case, in the body

(1) Turn. & Rus. 265, *in notis*; and see 4 Russ. 369, per Sir *John Leach*, M. R.

of her will, says, 'I believe there will be sufficient money left to pay my funeral expenses;' and in the codicil she uses the expression, 'If there is money left unemployed, I desire it may be given in charity.' In the will, the word 'money' must have referred to the general residue, because it was out of the general residue that the funeral expenses must be paid; and it could not be doubted, but that the same word in the codicil must have reference to the same subject."

Charitable bequests void for the uncertain or indefinite purpose.

Again, in *Vesey v. Jamson* (m), *John Vesey* gave the residue of his estate to his executors, upon special trust and confidence, nevertheless, to apply and dispose of the same in or towards such *charitable* or *public* uses or purposes, person or persons, or otherwise, as he might, by any codicil or codicils to that his will, or by memorandums in his own handwriting, direct or appoint, and as the laws of the land would admit of; and, in default of any such directions, or appointments, then, as to the whole residue, or in case of any such directions, or appointments, and the same should not be an entire disposition of such residue, then, as to such part of such residue concerning which no such direction or appointment should be made, *upon trust*, to pay and apply the same in or towards such *charitable or public purposes*, as the laws of the land would admit of, or to any person or persons, and in such shares and proportions, sort, manner and form, so as his executors, or the survivor of them, or the executors or administrators of such survivor, should, in their or his discretion, will and pleasure, think fit, or as they should think would have been agreeable to him, the said testator, if living, and as the laws of the land did not prohibit but admit of. The testator never by any codicil or memorandum specified any purpose, to which the residue was to be applied. The plaintiff, as next of kin, claimed the residue as undisposed of; and, on behalf of the *Attorney General*, it was insisted, that it must be applied to charitable purposes, under the direction of the Court, pursuant to the wishes of the testator. Sir *John Leach*, V. C., in determining the bequest void, observed, "In the event of no appointment of this residuary estate by the testator himself, he has given it to trustees to dispose of it at their will and pleasure, either for charitable purposes or public purposes, or to any person or persons, in such shares and proportions, sort, manner and form, as they in their discretion shall think fit, and the laws of the land shall not prohibit. It is in effect a gift in trust, to be

(m) 1 Sim. & Stu. 69.

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absolutely disposed of in any manner that the trustees think fit, which is consistent with the laws of the land, and so that it be not applied for their own use and benefit. The testator has not fixed upon any part of this property a trust for a charitable use, and I cannot therefore devote any part of it to charity. He has given it to the trustees expressly upon trust; and they cannot therefore hold it for their own benefit. The necessary consequence is, that the purposes of the trust being so general and undefined, that they cannot be executed by this Court, they must fail altogether, and the next of kin become entitled to the property. The case of *Morice v. Bishop of Durham*, is precisely in point" (n).

In *Kendall v. Granger* (o), the bequest was of personalty to trustees to be applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility. Lord *Langdale*, M. R., on the authority of the decided cases, held that this was not a trust which could be carried into effect as a charitable purpose: his Lordship observing, that the words "general utility," are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and, consequently to divert the trust fund from those purposes which this Court is in the habit of considering charitable.

Lastly, in *Williams v. Kershaw* (p), a testator directed his trustees to apply the residue of his personal estate, to and for such benevolent charitable and religious purposes, as they in their discretion should think most advantageous and beneficial, and for no other use, intent or purpose. Sir *C. Pepys*, M. R., held the bequest void for uncertainty.

(n) See *Fowler v. Garlike*, 1 Russ. & M. 232, and *Hoffman v. Hankey*, 8 Myl. & K. 376, where the bequests were void for uncertainty, but no charitable purpose was intimated,

supra, p. 189.

(o) 5 Beav. 300.

(p) 5 Cl. & Fin. 111; see also *Miller v. Rowan*, Ib. 99; *Pilkington v. Boughey*, 12 Sim. 114.

CHAPTER XX.

Of Interest upon Legacies.

INTEREST is payable on money in general, on the ground of delay in liquidation of the principal: so also, with respect to legacies, it may be stated as a general rule, that it is payable on them from the time at which the principal becomes actually due. The first inquiry therefore is when the principal of the legacy becomes payable; and upon this subject the reader is referred, in connection with the discussions in the present chapter, to the second section in the fourteenth.

Specific legacies are considered as severed from the bulk of the testator's property by the operation of the will, from the death of the testator; and as specifically appropriated, with their increase and emolument, for the benefit of the legatee from that period: so that interest is computed on them from the *death* of the testator: and it is immaterial whether the enjoyment of the principal is postponed by the testator to a future period, or not.

With respect to *general* legacies, the law, for convenience, has prescribed the general rule, that where no time of payment is named by the testator, and in the absence of any intention to be inferred from the will itself, such general legacies shall be raised and satisfied out of the testator's personal estate, at the *expiration of one year* next after his death; from which period, if the executor omit to pay the principal, the legatees will be entitled to interest (*a*), though actual payment within that time may be impracticable (*b*). But where the Court has decreed a legacy to be a satisfaction of a debt, the Court gives interest always from the testator's death (*c*).

Annuities, as before stated, in the absence of any direction in the will to the contrary, commence from the *death* of the testator, and the first payment becomes due, unless otherwise directed (*d*),

(*a*) *Barrington v. Tristram*, 6 Ves. 345; *Sitwell v. Bernard*, ib. 539; *Pearson v. Pearson*, 1 Scho. & Lef. 10; *Gibson v. Bott*, 7 Ves. 96; 10 Ib. 333.

(*b*) *Wood v. Penoyre*, 13 Ves. 333.

(*c*) *Clark v. Sewell*, 3 Atk. 98.

(*d*) As in *Houghton v. Franklin*, 1 Sim. & Stu. 390.

at the end of the year (*e*) from that event; so that if interest upon the arrears of the annuity be payable at all, it must be computed from the year's end. The rule is otherwise with respect to a general legacy bequeathed for life; for, that not being payable out of the assets before the end of the year from the death, no interest will be due thereon until the expiration of the second year (*f*). But the case is otherwise where a residue is given for life (*g*).

Where the time of payment of *general* legacies is fixed by the testator, as for instance, when the legatee shall attain twenty-one, or at any other definite period (*gg*), the legatees will not, in general, be entitled to interest before the arrival of that period (*h*), for the reason before noticed, that interest can only be due when there is delay in payment of the principal; and legatees will nevertheless be entitled to interest from the time appointed for the payment of the principal, though their legacies be charged upon a dry reversion (*i*). The rule is different where the bequest is of a *residue* (*j*).

But the rule respecting allowance of interest on *general* legacies only from the period named by the testator for the payment of the principal, is subject to exceptions: for instance, where the legatee is a child (*k*) of the testator, or one towards whom he has placed himself *in loco parentis* (*l*), and no maintenance given by the testator: this exception however is not extended in favour of the widow (*m*), the natural child (*n*), the grandchild (*o*), or niece (*p*) of the testator, nor even to a legitimate child of the testator, or one towards whom he has placed himself *in loco parentis*, if maintenance or interest be given, though less than the usual rate (*q*); which usual rate is 4*l.* per cent. (*r*),

(*e*) *Gibson v. Bott*, 7 Ves. 89, *infra*, and see Chap. XIV. sect. II. p. 856.

(*f*) See *Gibson v. Bott*, 7 Ves. 96.

(*g*) *Angerstein v. Martin*, Turn. & Rus. 232; *Hewitt v. Morris*, Ib. 241.

(*gg*) See *Frost v. Capel*, 2 Beav. 184.

(*h*) Pre. Ch. 337.

(*i*) *Lloyd v. Williams*, 2 Atk. 108, *infra*; *Davies v. Davies*, Dan. Exch. Rep. 87; *Heath v. Perry*, 3 Atk. 101; *Freeman v. Simpson*, 6 Sim. 75.

(*j*) *Nicholls v. Osborne*, 2 P. Wms. 419.

(*k*) *Incedon v. Northcote*, 3 Atk. 430, 438.

(*l*) *Acherley v. Vernon*, 1 P. Wms. 783; *Hill v. Hill*, 3 Ves. & Bea. 183.

(*m*) *Lowndes v. Lowndes*, 15 Ves. 301.

(*n*) Ibid.

(*o*) *Haughton v. Harrison*, 2 Atk. 329; *Lomax v. Lomax*, 11 Ves. 48.

(*p*) *Crickett v. Dolby*, 3 Ves. 10.

(*q*) *Long v. Long*, 3 Ves. 286, note.

(*r*) *Treves v. Townshend*, 1 Bro. C. C. 384.

except under special circumstances (*s*), and that, notwithstanding the legacies be in colonial currency (*t*), but subject to some exceptions (*u*).

The preceding rules and their various exceptions, with the subjects in immediate connection with them, will be discussed at large under the following arrangement:

SECT. I. Of interest on *specific* legacies.

SECT. II. Of interest on *general* legacies where time of payment is *not* named by testator.

1.—*Where the legacy is a gross sum, and principal given.*

2.—*Where only a life interest is given.*

SECT. III. Of interest on legacies, where the legatee is a *child* of the testator, or one towards whom he has placed himself *in loco parentis*; and,

see Sec 4.

SECT. IV. Of interest on *general* legacies, where time of payment is named by testator.

see Sec 3.

1.—*Where the legatee is a child of the testator, and maintenance is not given.*

2.—*Where maintenance or interest is expressly given, and the amount or rate specified.*

3.—*Where given generally, but amount or rate not specified.*

4.—*Where the maintenance is left to the discretion of trustees.*

5.—*Where the legatee is one towards whom the testator has placed himself in loco parentis.*

SECT. V. Of interest where legatee is the widow, natural child, grandchild, niece, or other stranger.

(*s*) *Bate v. Scales*, 12 Ves. 402;
Ibid. 127; 11 Ib. 92, 581.

(*u*) *Raymond v. Brodbelt*, 5 Ves.
199.

(*t*) *Bourke v. Ricketts*, 10 Ves.
330.

- 1.—*Where the widow.*
- 2.—*Where a natural child.*
- 3.—*Where grandchild, niece, or other stranger.*

A.—*Where the legatees are grandchildren, or any other class of strangers to the testator, and the legacies are given over, upon a contingency, to others whose consent cannot be obtained.*

B.—*Where such consent can be obtained.*

C.—*Where the legacies are not given over to others, but the legatees compose a class all or some of whom must absolutely take the fund.*

SECT. VI. Of interest where the legacy is contingent or payable in *futuro*, and though the interest is not expressly given, an intention to give it, in the shape of maintenance, fairly inferrible.

SECT. VII. Of interest when given by immediate bequest for maintenance, and the *parent of ability* to maintain the child, not allowed to be so applied, except,

- 1.—*Where to refuse its application would work a hardship or injustice.*
- 2.—*Where the maintenance or interest a gift to the parent to be applied for the children's benefit.*
- 3.—*Where not a bounty to the children, but in execution of a trust in contract.*

SECT. VIII. Of interest allowed as maintenance of an infant under 11 Geo. 4 and 1 Wm. 4, c. 65, s. 32.

SECT. IX. From what time interest on legacies allowed as maintenance.

SECT. X. Of interest, where a particular or residuary fund is given upon a contingency, so that the intermediate interest is undisposed of.

1.—*Where there is a previous life estate.*

2.—*Where there is not.*

SECT. XI. Of interest, where a particular or residuary fund is given by immediate bequest, with a condition to divest it upon a contingency with a limitation over to another.

SECT. XII. Of interest, where a *residue* is given so as to be vested immediately, but payable upon a future contingent event, with a condition divesting it in favour of a legatee over.

SECT. XIII. Of interest, where a *residue* of personal estate consisting of a mixed fund, is given to one for life, and after his death to one or more persons in remainder, and herein

1.—*Where the residue is given to trustees in trust to convert and invest it, there being no trust for accumulation.*

2.—*Where there is neither express trust to convert, nor trust for accumulation.*

3.—*Where there is a trust to convert and invest the produce in real estate to be settled on one for life, with remainders over, and no trust for accumulation; but a direction to apply the income of the funds invested until laid out in real estate, as the rents (if the real estate were purchased), would be applied.*

4.—*Where there is such a trust to invest in real estate to be so settled, with a trust for accumulation until investment in real estate.*

5.—*Where there is no trust for conversion of the residue but it is to be enjoyed in specie.*

SECT. XIV. Of interest on annuities.

SECT. XV. Of the rate or *quantum* of interest allowed on legacies; and herein, of legacies in colonial currency.

Interest on specific legacies.

SECT. I. Of interest on *specific* legacies.

The law considers specific legacies as severed from the bulk of the testator's property, by the operation of the will, from the testator's death, and with their increase (*z*) and emolument specifically appropriated for the benefit of the legatee from that period; so that interest is computed on them from the death of the testator, and it is immaterial whether the enjoyment of the principal is postponed by the testator or not.

In the case of *Sleech v. Thorington*, before stated (*a*), Sir *Thomas Clarke*, in deciding that the bequest of *India* bonds was not specific, ordered that the Master should compute the interest which they would have carried from a year from the testator's death, because he considered them as a bequest of quantity only; for if they were specific, it would be from the death.

So also in *Barrington v. Tristram*, before also stated (*b*), Lord *Eldon*, at the conclusion of his judgment respecting the bequest of the 5,000*l.* three *per cents.* given in trust for the children of Mrs. *Tristram*, said, "This being a specific legacy of stock, the dividends are due for maintenance from the death" (*c*).

In *Apreece v. Apreece* (*d*), a testator gave to *Robert Farquhar* and his wife 50*l.* each for a ring. Under the usual direction to compute interest on all such legacies as carried interest, the Master had not computed interest on these legacies considering them specific; but upon a motion for liberty to except to the Master's report, Lord *Eldon*, C., clearly held, that the legacies were *not* specific; and that the legatees therefore were entitled to interest within the terms of the decree.

In *Bristow v. Bristow* (*e*), the testatrix gave to a charity the sum of 1,700*l.* four *per cents.*, standing in the name of two trustees, which she directed to be paid within twelve calendar months after her decease. The stock had not been transferred, and the executors had received two half-yearly dividends on the stock which had accrued during the twelve months which elapsed since the testatrix's death, and which the executors claimed as part of the general estate on the ground they were not bound to transfer the stock until the end of the twelve months. But Lord *Langdale*, M. R., held the legatees entitled to the dividends from the death.

(*z*) See *Jacques v. Chambers*, 2 Col. 435.

(*a*) Page 214; 2 Ves. sen. 563.

(*b*) Page 48; 6 Ves. 345.

(*c*) See also *Howe v. Lord Dartmouth*, 7 Ves. 147.

(*d*) 1 Ves. & Bea. 364.

(*e*) 5 Beav. 290.

It is deemed unnecessary in this place to cite more cases in support of a rule so well established as the above; but they will incidentally occur in prosecuting the subject of the present chapter.

On general legacies, no time of payment named.

We therefore proceed to inquire, when interest is due on *general* legacies, where the time of payment is *not* appointed by the testator.

SECT. II. Of interest on *general* legacies, where time of payment is *not* named by testator.

1. Where the legacy is a gross sum, and the principal given.

1. Where legacy a gross sum, and principal given.

The law, as was observed in a former chapter (*e*), allows the executor one year from the death to ascertain and settle the testator's affairs; and it presumes that at the expiration of that period, and not before, all debts, &c., have been satisfied, and that the executor is able to apply the residue among the legatees (*f*). Before this period, therefore, a general legacy is not considered due, nor can the legatee claim it, although the executor may, if he thinks fit, pay it sooner: so that no interest accrues due for delay in payment of the principal, until after the expiration of the year from the death. When, therefore, no time is named, and in the absence of any contrary intention to be collected from the will, as the legacy itself is payable at the end of the year from the testator's death, if the executor do not pay it then, interest becomes due to the legatee from that period.

The general rule is stated in *Sleech v. Thorington*, before mentioned; and, indeed, it is unnecessary to cite cases establishing a rule so abundantly proved by the numerous exceptions to it, which will be discussed in the ensuing pages of the present chapter. In the case of *Hutchin v. Mannington* (*g*), Lord Thurlow spoke of the known practice of the Court to compute interest upon legacies from the year's end after the testator's death.

In the case of *Pearson v. Pearson* (*h*), where legacies of Bank stock and Government stock were given generally, without any time of payment named, to Mrs. *Vicars* and her son, one of the questions was, whether, as the fund was productive, interest was not payable from the death; and Lord *Redesdale* decided, that

(*e*) Vol. I. Chap. XIV. p. 841.

(*g*) 1 Ves. jun. 366, *supra*, p. 604.

(*f*) See *Wood v. Penoyre*, 13 Ves.

(*h*) 1 Schoales & Lefroy, 10.

On general legacies, no time named.

it was not. In the course of his judgment, he clearly stated the general rule, and observed, "Whether the fund bears interest, or not, is totally immaterial in the case of pecuniary legacies; I remember a case of *Greening v. Barker*, where the fund did not come to be disposable for the payment of legacies till near forty years after the death of the testator, and yet the legacies were held to bear interest from the year after the testator's death; and the Court then was of opinion, that it was a general settled and fixed rule, that pecuniary legacies bear interest from the expiration of twelve months, if there should at any time be a fund for the payment of them; and that in case the fund was productive within the twelve months, all the intermediate profits belonged to the residuary legatee. The executor may pay the legacy within the twelve months, but he is not compelled to do so; he is not to pay interest for any time within the twelve months, although during that time he may have received interest: but if he have assets, he is to pay interest from the end of the twelve months, whether the assets have been productive or not (i).

We shall here further add the case of *Beckford v. Tobin* (j), which, while it proves the rule in the way of exception, affords an instance where the intention was to be collected from the will itself, that the interest should be paid from the testator's death, so as to exclude the operation of the rule.

In that case, Sir *James Tobin*, by codicil, directed certain trustees named in his will (to whom he had bequeathed 4,000*l.* to be applied in such manner as he should appoint), to apply the 4,000*l.* to the uses of a boy named *Michael*, then five years old, and living with *John Tobin*; and to pay the expenses of his maintenance and education out of the interest of that sum. Upon a question, from what period interest should be paid upon the legacy; Lord *Hardwicke* determined, that the legacy should carry interest from the testator's death; observing, that as no time was appointed for the commencement of the legatee's maintenance and education, they were to be considered as intended to commence from the testator's death, and to continue throughout; and that unless the Court made such construction in favour of immediate interest, the child, in case he died within the year, would have no maintenance; and as no person could in such

(i) See also *Wood v. Penoyre*, 13 Ves. 333, per M. R.

(j) 1 Ves. sen. 308; see also *Hill v. Hill*, 3 Ves. & Bea. 183.

case apply any part of the interest for the benefit of the legatee, whoever should maintain him would have lost their money (*k*). On general legacies, no time named.

2. Where only the interest for life is given.

Where a general legacy is given to one for life, with remainder over to another, the case is otherwise; for there, the interest not being payable out of the assets until the end of the year from the death of the testator, no interest will be due until after the first payment is due, which will be at the end of the second year. This was laid down by Lord *Eldon*, in *Gibson v. Bott* (*l*), stated in a future page.

2. When life interest in the legacy is given.

SECT. III. Of interest on general legacies, where time of payment is named by testator.

We pass on to the consideration of the cases of *general* (*m*) legacies, wherein a time of payment is named by the testator. In such cases, the general rule is, that the legacies will not carry interest before the arrival of the appointed period of payment, and that notwithstanding the legacies are vested (*n*): but when that period arrives, the legatees will be entitled, although the legacy be charged upon a dry reversion. General legacies, time of payment appointed.

Thus, in *Lloyd v. Williams* (*o*), Mr. *Anwell*, by will, in 1669, created a trust term of twenty-one years for the payment of debts and legacies, and declared they should be paid within five years after his death. By a codicil, he devised the same estates to trustees in fee, and directed them during his wife's life to receive the rents and pay to the wife 300*l*. a year, and with the surplus profits to pay his debts, legacies, and funeral expenses, with all possible speed. One of the questions was, from what time a legatee of 20*l*. was entitled to interest; and the trustees insisted, that this was a dry reversion, and that there was no fund, if the estate had been sold to pay debts, &c. till the death of the widow, which happened in 1736. But Lord *Hardwicke* said, that a

(*k*) See the Lord Chief Baron's notice of this case in *Lowndes v Lowndes*, 15 Ves. 301, stated *infra*; and Sir *Thomas Plumer*'s in *Raven v. Waite*, 1 Swans. 558.

(*l*) 7 Ves. 89.

(*m*) The reader is referred to sect. xi. of this chapter, for the dis-

tinction between a particular and residuary bequest, where the time of payment is future.

(*n*) Pre. in Cha. 337.

(*o*) 2 Atk. 108; see also *Davies v. Davies*, Daniel Rep. in Exch. 84; *Freeman v. Simpson*, 6 Sim. 75.

General legacies, time of payment appointed.

legacy did in its nature carry interest, and he knew of no distinction between a reversionary estate and any other; and that the payment of interest in this case ought to begin at the expiration of five years, according to the directions of the will.

In the case of *Heath v. Perry* (*p*), a testator bequeathed 1,000*l.* a piece to five brothers and sisters (but no relations to him), to be paid to them at twenty-one, if they respectively attained that age, and not otherwise; and if any of them died before that period, then the legacy or legacies so given to them should be utterly void, and should sink into the surplus of his personal estate. The executors were empowered during the minorities of the legatees, or until the legacies became void, to lay out the money in mortgages or other securities for the purposes, and on the trusts of the will, and to call it in when they pleased; and they were not to be subject to any loss which might happen; and he made *B. Heath* residuary legatee. The bill was filed by the legatees for interest. But Lord *Hardwicke* decided that the legacies were contingent upon the event of the legatees attaining twenty-one, and that they were neither entitled to the interest in the meantime, nor to have the principal secured till they attained twenty-one; but it was to be laid out for the benefit of all the legatees, and that the residuary legatee was entitled to the intermediate interest. In the course of his judgment, his Lordship said, that where a legacy is given generally at marriage, or twenty-one, then the vesting and time of payment were the same, and should not vest till marriage or twenty-one; and further, that where a legacy is actually vested, as if given to *A.* payable at twenty-one, yet it shall not carry interest, unless something is said in the will that shews the testator's intention to give interest in the meantime. But all these cases are subject to this exception, if it is in the case of a child; for then, let a testator give it how he will, either at twenty-one, or marriage, or payable at twenty-one, or payable at marriage, and the child has no other provision, the Court will give interest by way of maintenance.

In *Crickett v. Dolby* (*q*), a testator bequeathed to his two nieces, *Sarah Crickett* and *Susan Crickett*, 500*l.* a piece, to be paid at their respective ages of twenty-one, or days of marriage, which should first happen, nothing being mentioned about interest or maintenance. The question was, whether the plaintiffs, the legatees, were entitled to interest upon their legacies before

(*p*) 3 Atk. 101.

(*q*) 3 Ves. 10.

they attained twenty-one; and Lord *Alvanley*, M. R., decided they were not. In the course of his judgment, he observed, "The rule is clear that a legacy, payable at any given time whatsoever, does not carry interest till that time, whether it is a vested interest or not: the time of payment must govern the commencement of interest, with this difference only, that a legacy given by a parent to a child, shall carry interest from the death of the testator, on account of the obligation attaching upon the person who gives it, and because it is in the nature of a portion; therefore interest in the meantime is added, though it is not given in express terms; and *Acherley v. Vernon* (r), was determined upon the idea that the testator put himself *in loco parentis*. All the other cases upon the point, whether the administrator of the legatee is entitled to the legacy immediately, or must wait till the period at which the legatee would have been entitled to it, depend upon this" (s).

General legacies, time of payment appointed.

Again, in *Tyrrell v. Tyrrell* (t), *John Allwright* bequeathed 300*l.* to all the children of his cousin *A. Tyrrell*, that should be living at the time of his (the testator's) death, to be equally divided amongst them, to be paid within twelve months after his death, or so soon after as they should respectively attain twenty-one; and he gave his residuary personal estate to *J. Tyrrell*, whom he appointed sole executor. The question was, whether the plaintiffs, the infant children of *A. Tyrrell*, were entitled to interest before the time of payment of the principal; and Lord *Alvanley*, M. R., decided that they were not, observing, "I am clearly of opinion, upon the rule that has been established, that wherever a sum of money is ordered to be paid at a particular time, unless in the case of an infant, having a right to demand maintenance from the testator, the legatee has a right from that time only. The duty attaches upon the executor, when the testator directs the legacy to be paid. No demand could be made upon the executor before that time, and though he may be called upon to secure the fund, he has a right to say, he shall not pay more than if he had not been called upon to secure it."

So also, in *Descrambes v. Tomkins* (u), a testator bequeathed to five legatees, 500*l.* each, to be paid at their respective ages of twenty-three; and if they should die before that time, then their respective legacies were to sink into the residue of the personal

(r) 1 P. Wms. 783.

(u) 4 Bro. C. C. 149, note; S. C.

(s) See *Roden v. Smith*, Amb. 588. 1 Cox, 133.

(t) 4 Ves. 1.

General legacies, time of payment appointed.

estate. The five legatees were maternal grandchildren of the testator, though not so described in the will. Their father was living, but in very bad circumstances, and it was prayed by petition, that the five legatees might be allowed interest upon their respective legacies till they attained twenty-three, and that such interest might be paid to their father for their maintenance in the meantime. But Lord *Thurlow* decided that it should not, saying, "the case of *Nicholls v. Osborn* (v), is the only case applicable to this; and that is rather a case of a personal gift with an executory devise upon it; and the difference is, where the legacy is given presently, but if the legatee shall die before a certain time, then over, and where it is given at a future time, as in this case."

It may be here remarked, that where a legacy is given payable at a future day, with interest in the meantime, and the legatee dies before the legacy becomes payable: the arrears of interest up to the time of his death, will belong to his personal representative. In *Harris v. Finch* (w), the testator devised a real estate to his daughter for life: and after her decease to his sons, as tenants in common in fee. By a codicil he directed, that if his daughter died, leaving any child or children living at her death, his sons should pay to such child or children, a sum of 200*l.* as they severally attained twenty-one: and should also pay interest for the same, until the said legacy should become due and payable, towards their maintenance. The daughter died, leaving an only daughter, who died under twenty-one. Lord Chief Baron *Alexander* decided that the administrator of the child was entitled to the interest from the death of the testator's daughter, up to the death of her child.

So also where a testator gives legacies payable to the legatees at their age of twenty-one, or marriage, and directs compound interest to be computed from the day of their birth, to be settled on their marrying or attaining twenty-one, whichever may first happen, the compound interest will run on each of the legacies until it becomes payable, and not merely to the day of the death of the testator (x).

In *Thomas v. The Attorney General* (y), the testatrix directed

(v) *Infra*, 2 P. Wms. 419.

(w) M'Clel. Excheq. R. 141; see *Slade v. Parr*, 1 Yo. & Coll. (C.), 565.

(x) *Arnold v. Arnold*, 2 Myl. & K. 365.

(y) 2 Yo. & Coll. (E.), 525; see also *Young v. Mackintosh*, 13 Sim. 445, and *Donovan v. Needham*, 10 Jur. 150.

the legacies to be paid by her husband as soon after her death as convenient, or within three years, if it suited the convenience of her husband. The legacies were not paid before the end of the three years, and upon a bill filed by the legatees, *Alderson, B.*, held, that the interest on the legacies should only be calculated from the end of the three years.

General legacies, time of payment appointed.

Where the testator gives legacies to be paid at a future day, as to *A.* upon his attaining twenty-one, and to *B.* at that age, or previous marriage, if *A.* attains twenty-one, and *B.* marries in the testator's lifetime, the legacies will be payable at his decease, and the legatees will be entitled to interest from that period (*z*).

SECT. IV. Of interest on legacies, where the legatee is a *child* of the testator, or one towards whom he has placed himself in *loco parentis*.

We proceed in this section, to consider the cases, where the legatee is a child of the testator, or one towards whom he has placed himself in *loco parentis*: and in such cases it is immaterial, whether the legacy be *particular* or *residuary*, or whether it be *vested*, but payable at a future time, or *contingent*: and here we shall adduce those cases—

1. First, wherein no maintenance or interest is given, and in such cases the rule is now well settled, that interest shall be allowed to such legatees from the time of the *death* of the testator: and the Court determines the *quantum* of the allowance, either the whole of the usual interest allowed by the Court, or less, according to circumstances.

1. Legacy contingent, or time of payment future, the legatee a child, and no maintenance, &c. given.

It appears from the case of *Crickett v. Dolby*, before noticed, that the case of a child formed an exception to the general rule, discussed in the preceding section, the Court considering parents under a natural obligation to provide a present as well as a future maintenance for their children (*zz*).

Thus in *Harvey v. Harvey (a)*, a testator devised and bequeathed all his real and personal estate to his eldest son, charged with 1,000*l.* a piece to all his younger children, *to be paid* at twenty-one, but without providing for their maintenance in the meantime. Upon the bill of the younger children for interest or maintenance during infancy, Sir *Joseph Jekyll, M. R.*,

(*z*) *Coventry v. Higgins*, 14 Sim. 30.

(*zz*) Pre. Cha. 367; 1 Atk. 505.

(*a*) 2 P. Wms. 21.

General legacies, time of payment appointed.

estate. The five legatees were maternal grandchildren of the testator, though not so described in the will. Their father was living, but in very bad circumstances, and it was prayed by petition, that the five legatees might be allowed interest upon their respective legacies till they attained twenty-three, and that such interest might be paid to their father for their maintenance in the meantime. But Lord *Thurlow* decided that it should not, saying, "the case of *Nicholls v. Osborn* (v), is the only case applicable to this; and that is rather a case of a personal gift with an executory devise upon it; and the difference is, where the legacy is given presently, but if the legatee shall die before a certain time, then over, and where it is given at a future time, as in this case."

It may be here remarked, that where a legacy is given payable at a future day, with interest in the meantime, and the legatee dies before the legacy becomes payable: the arrears of interest up to the time of his death, will belong to his personal representative. In *Harris v. Finch* (w), the testator devised a real estate to his daughter for life: and after her decease to his sons, as tenants in common in fee. By a codicil he directed, that if his daughter died, leaving any child or children living at her death, his sons should pay to such child or children, a sum of 200*l.* as they severally attained twenty-one: and should also pay interest for the same, until the said legacy should become due and payable, towards their maintenance. The daughter died, leaving an only daughter, who died under twenty-one. Lord Chief Baron *Alexander* decided that the administrator of the child was entitled to the interest from the death of the testator's daughter, up to the death of her child.

So also where a testator gives legacies payable to the legatees at their age of twenty-one, or marriage, and directs compound interest to be computed from the day of their birth, to be settled on their marrying or attaining twenty-one, whichever may first happen, the compound interest will run on each of the legacies until it becomes payable, and not merely to the day of the death of the testator (x).

In *Thomas v. The Attorney General* (y), the testatrix directed

(v) *Infra*, 2 P. Wms. 419.

(w) *M'Clell. Excheq. R.* 141; see *Slade v. Parr*, 1 Yo. & Coll. (C.), 565.

(x) *Arnold v. Arnold*, 2 Myl. & K. 365.

(y) 2 Yo. & Coll. (E.), 525; see also *Young v. Mackintosh*, 13 Sim. 445, and *Donovan v. Needham*, 10 Jur. 150.

the legacies to be paid by her husband as soon after her death as convenient, or within three years, if it suited the convenience of her husband. The legacies were not paid before the end of the three years, and upon a bill filed by the legatees, *Alderson, B.*, held, that the interest on the legacies should only be calculated from the end of the three years.

General legacies, time of payment appointed.

Where the testator gives legacies to be paid at a future day, as to *A.* upon his attaining twenty-one, and to *B.* at that age, or previous marriage, if *A.* attains twenty-one, and *B.* marries in the testator's lifetime, the legacies will be payable at his decease, and the legatees will be entitled to interest from that period (*z*).

SECT. IV. Of interest on legacies, where the legatee is a *child* of the testator, or one towards whom he has placed himself in *loco parentis*.

We proceed in this section, to consider the cases, where the legatee is a child of the testator, or one towards whom he has placed himself in *loco parentis*: and in such cases it is immaterial, whether the legacy be *particular* or *residuary*, or whether it be *vested*, but payable at a future time, or *contingent*: and here we shall adduce those cases—

1. First, wherein no maintenance or interest is given, and in such cases the rule is now well settled, that interest shall be allowed to such legatees from the time of the *death* of the testator: and the Court determines the *quantum* of the allowance, either the whole of the usual interest allowed by the Court, or less, according to circumstances.

1. Legacy contingent, or time of payment future, the legatee a child, and no maintenance, &c. given.

It appears from the case of *Crickett v. Dolby*, before noticed, that the case of a child formed an exception to the general rule, discussed in the preceding section, the Court considering parents under a natural obligation to provide a present as well as a future maintenance for their children (*zz*).

Thus in *Harvey v. Harvey (a)*, a testator devised and bequeathed all his real and personal estate to his eldest son, charged with 1,000*l.* a piece to all his younger children, *to be paid* at twenty-one, but without providing for their maintenance in the meantime. Upon the bill of the younger children for interest or maintenance during infancy, Sir *Joseph Jekyll*, M. R.,

(*z*) *Coventry v. Higgins*, 14 Sim. 30.

(*zz*) Pre. Cha. 367; 1 Atk. 506.
(*a*) 2 P. Wms. 21.

Legacy contingent, or time of payment future, the legatee a child, and no maintenance, &c. given.

on considering the case, and being attended with precedents, decreed them maintenance; observing, "That of late it had been the practice to allow maintenance, even in case of legacies that were not vested," and he cited *Bourne v. Tynte* (a). The reader will find the last *dictum* corresponding with that before (b) cited in *Heath v. Perry*.

Conway v. Longville (c), is another instance of a legacy to a child *vested* but payable *in futuro*; in that case, a father, by his will, gave 2,000*l.* a piece to his two daughters, payable at twenty-one, and charged upon real and personal estate. The personal estate being exhausted by the debts, Lord King, C., held that they should have a reasonable maintenance out of the real estate, until their legacies became payable, and allowed them 80*l.* a year each.

The case of *Inclendon v. Northcote* (d), is an instance of the legacy to the children being *contingent*. There Sir Henry Northcote devised all his real and personal estate to trustees, in trust, as to so much of his personal estate as should remain on his seat at *Pynes* at his death, that they should permit his wife to enjoy the same for life; and as to his real, and the rest of his personal estate, he gave them in trust for payment of all his debts, and subject thereto, for raising 5,000*l.* for such child or children of his body as should attain twenty-one, to be paid to such child or children, if but one, but if more than one in equal shares. One of the questions in the case was, whether the younger children were entitled to interest on their shares of the 5,000*l.* for maintenance. In giving judgment, Lord Hardwicke said: "The children have insisted upon interest on their shares for their maintenance, though the 5,000*l.* is given to such children of his body as should attain the age of twenty-one, and consequently, is not vested. In the case of *strangers*, whether the legacy be given absolutely, and payable at twenty-one; or not given until twenty-one, they can have no interest in the meantime; but in either of these devises, where they are given to *children*, the Court will direct interest for their portions immediately; and it has been so done frequently." As to the rate of interest, his Lordship at first said, that as no more had been allowed for many years than four *per cent.* for maintenance, he did not care to break through the rule: but afterwards, in

(a) 2 Vent. 346, cited in *Acherley v. Vernon*, 1 P. Wms. 786.

(b) *Supra*, p. 1254.

(c) 1 Eq. Ca. Ab. 301, pl. 3.

(d) 3 Atk. 432, 438.

consideration of the interest of money having been altered within the two preceding years, mortgages then being at four and a half and several at five *per cent.*, his Lordship ordered that the children should have four and a half *per cent.* interest on their respective shares.

Legacy contingent, or time of payment future, the legatee a child, and no maintenance, &c. given.

So also in the case of *Mole v. Mole* (e), which was the case of a *residue*: there the father of the plaintiff, the infant, bequeathed to the defendant his sister 500*l.* and gave the *residue of his* estate to the plaintiff upon his attaining twenty-one, and the interest *to accumulate* with no provision as to maintenance; and if the plaintiff died before twenty-one, he gave it to the defendant. Upon a bill by the infant for the usual accounts, and to have the residue secured with an allowance for maintenance, Sir *Thomas Clarke*, M. R., decided that it should; and that the decree was that the Master should consider of a proper allowance for the maintenance and education of the plaintiff, the infant, from the death of her father, the testator, to be paid out of the produce of the testator's estate. The reader will observe that the above is as strong a case as could well arise in support of the exception, the legacy being contingent, and given over on the death of the legatee under twenty-one, and the will containing an express direction that the interest should accumulate.

In *Brown v. Temperley* (f), the preceding case of *Inclendon v. Nothcote* was followed. In the former the testator devised and bequeathed the residue of his real and personal estate to trustees upon trust for such one or more of his children as should attain twenty-one or marry under that age with consent. The will does not appear to have made any provision for maintenance. The Court decreed maintenance.

Here we add the case of *Chambers v. Goldwin* (g), wherein *Tristram Ratcliffe* devised estates in the island of *Jamaica* to trustees, upon trust to pay debts, and to maintain and educate his sons during their minorities, and his daughter until her age of twenty-one years, or day of marriage, which should first happen, in such manner as his trustees should think proper; and, subject thereto, he devised his estates to his sons, charged with the payment thereof, of the sums of 10,000*l.* and 5,000*l.* currency to his daughter, in case she should live to attain

(e) 1 Dick. Rep. 310; see also *Carey v. Askew*, 2 Bro. C. C. 59, as to the case of a portion by settlement,

Greenhill v. Wuldoe, Pre. Cha. 367.

(f) 3 Russ. 263.

(g) 11 Ves. 1.

Legacy contingent, or time of payment future, the legatee a child, and no maintenance, &c. given.

twenty-one; the same to carry interest from the time of her attaining that age, at the rate of *six per cent.* The decree directed an inquiry who had maintained the children, and what was proper to be allowed for their maintenance for the time past, from the death of their father, and to come. The report stated that the plaintiff, Mrs. *Chambers*, the testator's daughter, was maintained according to the directions of the will, until her marriage upon the 3rd of *January*, 1795, when she was of the age of eighteen; and from that time till she attained twenty-one in 1798, by her husband. The cause coming on for further directions, the question was upon the claim of the plaintiffs for the maintenance of Mrs. *Chambers* from the time of her marriage, until the age of twenty-one years, and Lord *Eldon* observed: "This is a most doubtful case, that has occurred upon the point of maintenance. But upon the whole, the testator having expressly provided for maintenance up to a certain period, leaving a chasm unprovided for, and having given interest, as interest, from the period of majority to the time when the legacy was to be paid, the Court may infer, that he did not mean, that this child should have nothing in that interval; by analogy to the case of a legacy to a child, payable at a future day, though nothing is said about interest the Court infers, that the father did not intend, that the child should not be maintained, and receive education, during the whole period of the infancy; a reasonable maintenance therefore ought to be allowed from the age of eighteen, when the plaintiff married, until Mrs. *Chambers* attained twenty-one."

Exception where child is *in ventre matris* at testator's death.

It will be proper here to notice an exception to the rule in favour of children, namely, that a child *in ventre sa mere* at the time of the father's decease, will only be entitled to interest from its *birth* and not from its father's death, though he so directed by his will. Thus in *Rawlins v. Rawlins* (g), the testator gave to each and every of his children born or thereafter to be born, who should be living at his decease, 5,000*l.* a piece, to be paid at twenty-one, &c., with interest thereon to be *computed from the day of his death*. Lord *Loughborough*, C., decided as before (h) stated, that the posthumous child was entitled to a legacy of 5,000*l.*; but said, "That the interest was to be computed only from the *time of the birth*."

The rule of the Court of Chancery in allowing maintenance to a child out of the interest of the legacy given by the will of a

(g) 2 Cox, 425.

(h) Page 45.

parent, or one in *loco parentis*, although the will is silent as to maintenance, is applicable also to the income of a distributive share of the personal estate to which a child becomes entitled on the intestacy of the parent; the natural obligation to provide for the maintenance of the child being the same whether the corpus of the provision devolves upon the child by the bequest or the intestacy of the parent.

Legacy contingent, or time of payment future, the legatee a child, and no maintenance, &c. given.

In *Bruin v. Knott* (i), an infant child of a freeman of *London* entitled under the custom of *London* to an orphanage share on the father's intestacy, was maintained by the mother from the period of the father's death to that of the child's. The Court allowed the mother the sums she had expended in the maintenance of the child; Lord *Lyndhurst*, C., observing that the child had a right to be maintained out of the orphanage share.

2. We proceed, secondly, to those instances, where the legatee is a child of the testator, and maintenance or interest is given by the will, and the amount or rate specified; in which case the legatee will not, in general, be entitled to claim more than the maintenance or interest specified, though it be less than the usual rate of interest, unless under particular circumstances, and the sum specified be insufficient.

2. Where maintenance, &c. given, and the amount specified.

Thus, in *Hearle v. Greenbank* (j), *Mary Winsmore* bequeathed to her daughter *Mary* 100*l.* a year until the age of ten years; and afterwards the sum of 50*l.* a year till she attained twenty-one; "the said sums to be applied by her executors for the education and maintenance of her said daughter according to their discretion." The testatrix also gave to her daughter 8,000*l.* to be paid when she attained twenty-one; but if she died before attaining that age, without issue living at her death, she then bequeathed the 8,000*l.* to her two cousins (naming them) in equal shares, and she charged the said legacy, together with several others, upon her real and personal estate. One of the questions in the cause was, whether the legatee was entitled to the interest of the entire legacy? Lord *Hardwicke* decided she was not; observing, "I admit where a legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the Court allows interest. But in all these cases, the ground the Court goes on is, giving interest by way of maintenance. Here *Mrs. Winsmore* has allotted maintenance

(i) 12 Sim. 456; 1 Phil. 573.

Selby v. Gillum, 2 Yo. & Coll. (E.),

(j) 3 Atk. 697, 716; see also 379.

Legacy contingent, or time of payment future, the legatee a child, and no maintenance, &c. given.

for her daughter from the general fund of her personal estate: there is another thing observable, the contingency in her will of the daughter dying before twenty-one: I agree it is a condition subsequent, but it still shews the view of the testatrix, and that she saw it might never be her daughter's; and that, therefore, to give her interest would be contrary to the intention of the testatrix. There are several cases where this Court has made a great stretch to give children interest upon legacies, particularly *Acherley v. Vernon* (k); but that went upon particular circumstances. I am therefore of opinion, that she can have no more interest than the maintenance in the meantime" (l).

Again, in *Long v. Long* (m), the sum of 15,000*l.* was secured by settlement to the younger children of Sir *James Tilney Long*, payable at twenty-one or marriage, with maintenance at the rate of two *per cent.* till payment. There were three younger children. Sir *James Tilney Long* by will directed that the portion of each child should be increased to 10,000*l.*; and he directed that the additional sums of 5,000*l.* should be paid at the same ages, days and times as their respective shares in the 15,000*l.* under the settlement. The younger children pressed for interest at the rate of four *per cent.* upon the additional portions; and Lord *Loughborough*, C. decreed, that two *per cent.* should be continued upon the increased capital: and after stating the general rule in favour of children, observed, "I do not believe a case can be found where, the child having a provision, the Court has conceived that rule to apply, and a provision upon the circumstances such as is equal to maintain the child. The rule standing so generally, I think I should be establishing a new precedent, by giving four *per cent.* upon the additional 5,000*l.*"

But where the legacies are paid into Court, the legatees will be entitled to the entire interest on the money in Court, although the directions in the will were to pay interest by way of maintenance at a less rate (n).

Where the rate specified is insufficient, it will be increased.

Where the amount specified is insufficient, the Court will allow a reasonable maintenance, the legacy being vested; and notwithstanding the surplus interest be directed to accumulate.

Thus, in *Aynsworth v. Pratchett* (nn), *Thomas Aynsworth* gave his real and personal estate to trustees, upon trust to pay his wife

(k) *Infra.*

Bredin v. Bredin, 1 Dr. & W. 494.

(l) Lord *Loughborough*, inclined to the same opinion in *Mitchell v. Bower*, 3 Ves. 287.

(n) *Abraham v. Holderness*, 6 Jur. 290.

(nn) 13 Ves. 321.

(m) 3 Ves. 286, note; see also

for her life, such annual sum as would, with the rents and profits of his estate settled upon her, make up 100*l. per annum* : and upon further trust, by sale or mortgage, to raise and pay to his wife, for the maintenance and education of all the children he might have by her, living at his death, 30*l. per annum*, as long as they should choose to remain under her care. The testator also directed his trustees to pay to all his daughters living at his death, or born in due time afterwards, when and as they should respectively attain twenty-one, 1,000*l.* each; and he gave the residue equally among his sons *John*, *William* and *Thomas*, and such other sons as he might have by his wife living at his death, equally as tenants in common, &c. with survivorship. *William* being dead, the surviving children, after the death of the testator, filed their bill for an increase of maintenance. The petition stated their ages, that the annual produce of the real and personal estate, after payment of debts, greatly exceeded the allowance of 30*l.* each; that they lived with their mother; had no other fortune; that the allowance of 30*l.* was greatly insufficient; and that the mother's income was only 100*l. per annum* under the will; and they prayed maintenance from the time past from the death of their father, and to come; and Sir *William Grant*, M. R., upon the authorities, made the order; and a reference was directed accordingly.

Legacy contingent, or time of payment future, the legatee a child, &c. and maintenance, &c. given.

Again, in *Stretch v. Watkins* (o), *James Stretch*, after bequeathing several legacies to his wife, proceeded thus: "To my dearly beloved daughter, *Anna Stretch*, daughter of my abovesaid wife, I give and bequeath 120*l. per annum*; (that is to say), the interest of 4,000*l.* of my three *per cent.* consolidated annuities; it is my wish and will, that the interest, as it becomes due, be added to the principal till she attains the age of twenty-one years, except 20*l. per annum* to find her clothes," &c. Then, after a similar bequest to his daughter *Mary*, the testator adds, "But if my said wife should die before my said above daughters attain the age of twenty-one years, then 50*l. per annum* may be taken from their annuities to maintain and bring them up to twenty-one years of age;" and he gave the residue to his son *James*. The mother and daughters, after the testator's death, filed their bill against the executors, and *James* the infant, and his guardian, praying that their legacies might be transferred to the Accountant General, and that *Anna* and *Mary Stretch* might be entitled to the dividends of their respective legacies of

Legacy contingent, or time of payment future, the legatee a child, &c. and maintenance, &c. given.

4,000*l.* three *per cents.* during their minorities, and the principal when they attained twenty-one: and that it might be referred to the Master to inquire what would be a proper allowance for maintenance. Sir *Thomas Plumer*, V. C., decided, that a gift of the interest, without limitation, was a gift of the principal, and that the legacies to the daughters were vested: and it being suggested that the question as to what should be allowed for maintenance had better come on upon petition, his Honor observed, "The decree, then, must be made according to the prayer of the bill, except as to what relates to maintenance, which will come on upon petition. It is admitted, that though the testator has expressly directed an accumulation of the interest (except as to 20*l.*) arising out of the daughters' legacies, until twenty-one, yet the Court, where the child has a *vested* interest in the principal, will allow what is necessary for the infant's maintenance" (*p*).

Exception where maintenance is provided out of another fund.

But it may be here observed, that although where maintenance is provided out of *another fund*, interest will not be given on a legacy, which is payable *in futuro*; the interest on the amount of the legacy may regulate the *quantum* of the maintenance, where the amount is not specified.

Thus, in *Wynch v. Wynch* (*q*), *Alexander Wynch* gave to each of his daughters *Margery* and *Frances* the sum of 10,000*l.* to be paid at twenty-one or marriage; and he directed his trustees should pay and apply such sum and sums of money *out of his personal estate*, towards the maintenance and education of his daughters, until their portions should become payable, as his executors should think fit, not exceeding the interest of their respective portions after the rate of four *per cent.*; and he declared the said legacies should not be considered vested, until payable as aforesaid; but if either of his daughters should die under twenty-one, and unmarried, her legacy was to sink into the residue. The question was, whether the daughters were entitled absolutely to interest at four *per cent.* on their legacies, or only to a maintenance until they became payable: and Lord *Alvanley*, M. R., said, "It is very clear, that when a father gives a legacy to a child, whether it be a vested legacy or not, it will carry interest from the death of the testator, as a maintenance for the child; but this will be only where no other fund is

(*p*) And see *Fairman v. Green*, 10 Ves. 48. *ham*, 9 Beav. 164; *Bredin v. Bredin*, 1 Dru. & W. 494.

(*q*) 1 Cox, 433; *Donovan v. Need-*

provided for such maintenance; for it is equally clear, that where other funds are provided for the maintenance, then, if the legacy be payable at a future day, it shall not carry interest until the day of payment comes, as in the case of a legacy to a perfect stranger. Now here the father has directed that maintenance shall be paid out of *his personal estate*; if it had been payable out of the interest of the legacies, I should have thought the daughters entitled to what they claim; but as it is, I think they are not entitled to interest on their legacies *eo nomine*. I therefore declare, that *Margery* and *Frances Wynch* are not entitled to *interest* on their *legacies*, until the same become payable, but only to maintenance not exceeding four *per cent.* on their said legacies."

Legacy contingent, or time of payment future, the legatee, a child, &c. and maintenance, &c. given.

Nor where maintenance is given until a certain event and then to cease, will it be allowed, unless the consent of all persons ultimately entitled can be obtained.

Nor where maintenance directed to cease at a time specified, the consent of all parties ultimately entitled not being obtained.

Thus in *Kime v. Welfitt* (r), the testator directed the interest of the residue of his personal estate to be paid to his wife, for the maintenance of herself and her children, until the death of her father, when the testator directed it should cease and be accumulated for the childrens' benefit, as he understood that his wife's father had by his will made ample provision for them after his decease. The accumulations were to be transferred to the children at twenty-one, with benefit of survivorship on their dying under that age and without issue, and in case they left issue, the issue were to take the deceased parent's share: there was a bequest over to the testator's brothers and sisters, in case all the children died under twenty-one and without issue. The testator died in the lifetime of his wife's father, who shortly afterwards died without making any provision for the wife or children. Under these circumstances, the children claimed an allowance for maintenance, the testator's brothers and sisters consenting, but Sir *L. Shadwell*, V. C., refused the allowance prayed, on the ground that there might come into existence other claimants, the issue of the children, who would be entitled to the fund, and his Honor said, he was not aware of any case which would authorize him to affect their rights.

3. Where the legatee is a child of the testator, and maintenance is directed generally, but no specific sum or rate of interest on the legacy being mentioned, the Court varies the allowance

3. Where no specific sum or rate of interest mentioned, but maintenance given in general terms.

Legacy contingent, time of payment future, the legatee a child, &c. and maintenance, &c. given.

according to circumstances; in some cases allowing four *per cent.* on the whole legacy, in others referring it to the Master to consider the *quantum* of allowance; and the Court accordingly directs it with regard to the fortune and circumstances of the legatee. This may be collected, as well from the cases which have already been stated, as from those which will be adduced in the next section; and to them may be added the case of *Matchwick v. Cock* (rr), and *Freemantle v. Taylor* (s).

In the latter case, *Stephen Freemantle*, by will, in 1793, reciting that he had 4,000 guineas to dispose of, bequeathed to his son *John Freemantle* the sum of 2,000*l.* *British*, and the remainder to be divided between his two girls; he left the interest of the whole fund to his wife, to be by her applied for the benefit and education of his children, until the girls should be married, or attain twenty-one; at which period they were to be independent, as far as that sum went. The testator subsequently declared that he meant that his wife should receive the benefit of the interest of the 4,000 guineas for her own use entirely until *Mrs. Molloy's* death, and then, according to the terms specified on the other side, *viz.*, "for the advantage and education of my children, trusting entirely to her honour and affection for her children." The testator's widow married again, and, on the death of *Mrs. Molloy*, succeeded to a pension. Upon the petition by the three children of the testator, living at the date of the will, praying maintenance, and submitting the question, whether another daughter born after the date of the will, was entitled to maintenance, upon whose behalf also another petition was presented, *Sir William Grant*, M. R., upon the authority of *Matchwick v. Cock*, made the order for maintenance upon both petitions.

4. Where maintenance is given generally at the discretion of trustees.

4. The exception is likewise extended to the case, where maintenance is left to the *discretion* of trustees, and they refuse it, the mother being of ability, but married to a second husband.

Thus, in *Billingsley v. Critchet* (t), a bill was filed by the children of *John Billingsley* against his widow, who was married to the defendant *Critchett*. *J. Billingsley*, by will, gave to his children about 4,000*l.* stock, and, as appears by the argument of the counsel, there was a discretion vested in the trustees of the will either to give an allowance or not, who, upon application, thought such allowance unnecessary. The testator had made a provision

(rr) Stated p. 35.

v. Fentiman, 13 Sim. 171.

(s) 15 Ves. 363, and see *Fentiman*

(t) 1 Bro. C. C. 267.

for his widow, who had a further estate from her own family. The question was, whether the mother was obliged to support the children, or it was to be done by an allowance out of the interest of the stock given to them by their father; and it was decided by the Lords Commissioners *Ashurst* and *Hotham*, that the widow was entitled to such allowance; and it was referred to the Master to see what was proper to be allowed for the maintenance and education of the plaintiffs, the infants, from the time of the intermarriage of the defendant *Critchett* and his wife, and for the time to come. Lord Commissioner *Ashurst* observed, that had the widow continued unmarried, he should have had some doubt.

Legacy contingent, time of payment future, the legatee a child, &c. and maintenance, &c. given.

In *Lanoy v. Duke of Athol* (*u*), however, Lord *Hardwicke* said, that to compel the mother in that case (a widow and unmarried) to maintain her daughter out of her own estate would be going too far, and, therefore, he should lay that out of the case: and in *ex parte* Lord *Petre* (*v*), maintenance was allowed the mother Lady *Petre*, to a very considerable amount.

Again, in the recent case of *Bruin v. Knott* (*w*), the mother was allowed what she had expended in the maintenance of her orphan child from the death of the father to that of the infant.

In *Beaseley v. Magrath* (*x*), Lord *Redesdale* said, the mother had no right to charge her child with any maintenance, except out of the interest of the child's fortune; and, that if the mother thought fit to support her child, she could not make that child pay out of the principal of its fortune.

For instances where maintenance is allowed the father not being of ability, but the mother having a competent separate estate, the reader is referred to a future page (*y*).

In *Newman v. Bateson* (*z*), 20,000*l.* was bequeathed by the testator to his natural daughter, with directions that so much of the interest should be applied in her maintenance, as his executors should think proper. The Master of the Rolls for the Lord Chancellor said, that, although the daughter was a natural child, yet the testator having given maintenance expressly to her, it came within the common rule of a legacy given to a child, and

(*u*) 2 Atk. 477.

(*v*) 7 Ves. 404.

(*w*) 1 Phil. 572.

(*x*) 2 Scho. & Lef. 35.

(*y*) *Infra*, p. 1287.

(*z*) 3 Swanst. Appx. 689; *Douling v. Tyrell*, 2 Rus. & Myl. 343; *Stephens v. Lawry*, 2 Yo. & Coll. (C.), 87.

Legacy contingent, time of payment future, the legatee a child, &c. and maintenance, &c. given.

5. Where the testator has placed himself *in loco parentis*.

directed interest from the time of the testator's decease; Lord Colchester's MSS.

5. The exception of giving interest before the principal is due, is extended to the case of a legatee, who, though *not a child* of the testator, is one towards whom he has placed himself *in loco parentis*, and an infant, for the exception is not made in favour of adults (*x*); and in such cases interest will accordingly be computed from the testator's death.

Thus, in *Acherley v. Vernon* (*y*), Mr. *Vernon*, the Chancery counsel, bequeathed to his sister's daughter, *Letitia Acherley*, 1,000*l.* at her age of eighteen, or marriage; and after giving some other legacies, he bequeathed the residue of his personal estate, which was to be invested in land, and all his real estate, to trustees, in trust to settle the whole upon *B. Vernon*, as therein mentioned. By codicil, the testator directed that *Letitia's portion* of 1,000*l.* should be made up 6,000*l.*, and paid to her at twenty-one, or marriage. *Letitia* was about eighteen at the date of the codicil. Upon a suit instituted by her for interest upon her portion, to be computed from the testator's death until she attained twenty-one or marriage, Lord *Macclesfield*, C., decreed it accordingly: observing, that it had weight with him, that by the will *Letitia's* legacy was given at eighteen, and that she having attained such age, in the life of the testator, the codicil ordered it to be made up 6,000*l.*, postponing the payment to twenty-one or marriage; so that, although the actual payment was deferred until twenty-one or marriage, the legacy was vested presently; and being severed from the rest of the estate, which residuum alone *B. Vernon* was concerned in, the interest of the 6,000*l.* could belong to no other person than *Letitia*.

It will occur in perusing the last case, that the testator intended to substitute himself *in loco parentis*; the legatee was his sister's daughter, and his heir-at-law, and he called the gift, by a codicil, a *portion*; these were, therefore, strong circumstances to make the case an exception to the general rule, in addition to the other reason.

To the preceding case, *Beckford v. Tobin*, before stated (*z*), may be added, in which case, the circumstance that the legatee would have otherwise been unprovided for, seems to have had

(*x*) As in *Raven v. Waite*, 1 Swan. 553, *infra*, p. 1270.

(*y*) 1 P. Wms. 783.
(*z*) Page 1252.

much weight. The case of *Churchill v. Speake* (a), if it can be reconciled with more modern determinations, must, it is presumed, be referred to the principle of the preceding case of *Acherley v. Vernon*.

Legacy contingent, time of payment future, the legatee a child, &c. and maintenance, &c. given.

The case of *Hill v. Hill* (b) also falls within the present class of cases. In that case *Jeremiah Hill* bequeathed as follows: "I give and bequeath unto *Mary Ann Hill, Matilda Lydia Hill, Edward Jeremiah Hill, and Penelope*, the four legitimate children of my late son, *Thomas Hill*, deceased, by *Ann Hill*, late his wife, now his widow, 8,000*l.* each, and to *Thomas Hill*, the eldest illegitimate child of my said deceased son, 10,000*l.*, and to *Charles Hill*, the other illegitimate child of my said deceased son, 6,000*l.*, the same legacies or sums to be considered as vested interests in all of the said six children respectively, on their attaining respectively the age of twenty-one years, or dying under that age, and leaving issue of their respective bodies lawfully begotten; and it is my will, that in the meantime, and until they shall attain respectively as aforesaid, their said respective legacies shall be paid into the hands of *William Tanner*, of *Bristol*, gentleman, and *William Perry*, of the same city, wine merchant, their executors or administrators, as trustees for the said children, and shall be by them laid out in Government stocks or funds, or in such other public or private real or personal securities, as they shall think proper, and the interest, dividends, and profits, of such respective legacies, shall be by them applied in the maintenance and education of the said respective children of my said deceased son, or in their placing out and advancement in the world, or otherwise be accumulated for their benefit at the discretion of my said trustees: and in case any or either of the said six children of my said deceased son shall happen to die under the age of twenty-one years, and without leaving issue of their respective bodies, lawfully begotten, then it is my will, that the legacy or legacies of such child or children so dying, with the unapplied interest thereof, if any, shall from time to time, and as often as it shall happen, go to and be divided amongst the survivors or survivor, or others or other of the said six children, to be vested in them respectively, upon their attaining their said respective ages of twenty-one years, or dying under that age, and leaving lawful issue as aforesaid; but

(a) 1 Vern. 251; see also *Newman v. Bateson*, 3 Swanst. Appx. 689, (1789), *supra*, p. 1267.

(b) 3 Ves. & Beam. 183.

Legacy contin-
gent, time of
payment fu-
ture, the lega-
tee a child, &c.
and mainte-
nance, &c.
given.

in case all of them shall die under that age, without leaving lawful issue as aforesaid," then the testator gave and bequeathed over the said several legacies or bequests so given to them as aforesaid, together with the unapplied interest thereof, if any; and he declared his will, "that the said trustees, their executors and administrators, shall and may, from time to time, during the minorities of the said four children of his son, *Thomas Hill*, deceased, pay or advance to their mother, *Ann Hill*, the interest, dividends, and produce of their respective legacies or bequests hereinbefore given to them as aforesaid, or so much thereof as they shall think proper to be by her, the said *Ann Hill*, laid out in the maintenance and education of her said four children respectively at her discretion; and her receipt, &c., shall be sufficient discharge, &c." The bill was filed on behalf of the six infant children of *Thomas Hill*, alleging, that upon the death of their late father, who died insolvent, the testator, their grandfather, took upon himself their care and maintenance, prayed payment of their legacies, with interest from the death of the testator. It was insisted for the plaintiffs, that the testator placed himself *in loco parentis*. Sir *William Grant*, M. R., said, there was no solid distinction between this case and *Beckford v. Tobin*, and therefore the interest must be calculated from the testator's death (*bb*).

The exception
in favour of
children, &c.
of the testator,
not extended to
adults.

We may here observe, that the exception in favour of children of the testator, and those towards whom he has placed himself *in loco parentis*, does not extend to *adults*: the point is expressly decided with respect to the latter class in *Raven v. Wate* (*c*), and the case of *Lowndes v. Lowndes* is conceived to be an authority for the rule, as it affects the testator's own children: indeed, the cases do not justify any distinction between the testator's own children and those towards whom he has placed himself *in loco parentis*, but considers them entitled to the same privileges.

In the case of *Lowndes v. Lowndes* (*d*), stated in the next section, the testator's daughter, *Elizabeth*, claimed the interest on a legacy of 20,000*l.* from the death of the testator; but she claimed in two characters, first as administratrix of her mother, the widow of the testator, who had a life interest in the legacy, but who only survived the testator about two months; and secondly, in her own right, as entitled for life, after the death of

(*bb*) See also *Wilson v. Maddison*, 2 *Yo. & Coll. (Ch.)*, 372; *Rogers v. Soutten*, 2 *Keen*. 598.

(*c*) 1 *Swanst.* 553; see also *Wall v. Wall*, 11 *Jur.* 403.

(*d*) *Infra*, p. 1272.

her mother. On the hearing, the Chief Baron observed, that to support the claim of interest upon the 20,000*l.* it must be argued that the daughter *Elizabeth*, who was an *adult*, would be immediately entitled to the interest from the death of the testator, if *Elizabeth*, the mother, had died in the testator's lifetime; and upon a subsequent day, the Chief Baron said, the Court were of opinion, that neither the widow, nor the *daughter* were entitled to interest on the 20,000*l.* from the testator's death.

The exception in favour of children of the testator not extended to adults.

In *Raven v. Waite*, the testator bequeathed 1,600*l.* to trustees, upon trust, to place it on security, and pay the interest to *Frances Raven*, for the maintenance of herself and children, until the youngest should attain twenty-one; and then for her own use, during widowhood: the will also directed payment of certain annuities to other persons, from the first quarter day from the testator's death. *Frances Raven* was living separate from her husband, the testator's nephew, and receiving a voluntary annuity from the testator during the testator's life. A bill was filed on behalf of *Frances Raven*, who claimed interest on the legacy from the testator's death, the testator clearly having placed himself towards her *in loco parentis*. Sir *Thomas Plumer*, in reference to the exception in favour of the children of the testator, observed, that "the foundations of that exception were the natural obligation of the parent to provide for his child, and the incompetence of the child to give a discharge for the principal; and, therefore, that the Court concluded the parent had postponed payment of the principal, in respect only of this inability to give a discharge, and inferred an intention that interest should be paid immediately. He further remarked, that all the cases decided, were cases of *infants*; but that no case had been produced, in which it ever was extended to a legacy in favour of an *adult*, though cases innumerable must have occurred of legacies to persons aged and decrepit, objects of the testator's bounty during life: and after recognising the case of *Lowndes v. Lowndes*, as a direct decision in point, his Honor concluded with observing, that the extension of the exception to an adult, was therefore negatived by the latest, or rather the only, decision on the subject; and that he could not carry the exception beyond the authorities, and introduce a new case, in which the rule was to be relaxed, and he dismissed the bill accordingly.

But the exception discussed in this section in favour of children of the testator is not extended to his wife, natural child, or grandchild, all of whom are considered as *strangers*; they will not therefore, as will be shewn in the following section, be entitled to

Where the legacy is contingent, or time of payment future, no interest given, and the legatee is the wife of the testator.

interest on their respective legacies, until the time of payment of the principal, unless they fall within other exceptions to be hereafter noticed, of being otherwise destitute, or unless an intention to give interest in the meantime can be inferred from the will.

SECT. V. Of interest where legatee is the wife, natural child, grandchild, niece, or other stranger.

1. With respect to the *wife*. In *Crickett v. Dolby* before stated (e), Lord *Alvanley*, M. R., says, "I think a wife would certainly come under the same exceptions as a child. I do not find it in the books. It can hardly ever happen that a wife has not some other provision, and that may make a difference in the case of a child." Notwithstanding this *dictum*, the law is now well settled to the contrary.

Thus, in *Stent v. Robinson* (f), the testator bequeathed to trustees 10,000*l.* out of his capital in trade which he might die possessed of, to be invested by them, with the concurrence of his wife, in such funds and legacies as should be deemed eligible, in trust to pay the interest to his wife half-yearly during her life, for her separate use. The widow married again: and a petition was presented by her and her husband, praying that the Master might be directed to allow interest upon the legacy of 10,000*l.* at five *per cent.* from the day of the testator's *death*, until it should be laid out in stock; and, from that time, the dividends. But Sir *William Grant*, M. R., dismissed the petition, observing, that there was nothing to support it, except that *dictum* by Lord *Alvanley*, and there was no authority to support that, notwithstanding the numerous instances of legacies to wives.

Again, in *Lowndes v. Lowndes* (g), the testator *William Lowndes* gave to trustees the sum of 20,000*l.* sterling, to lay it out at interest on government securities, and pay the annual produce to his wife *Elizabeth* for life, and after her death, to his daughter for life. The testator also gave to his daughter *Elizabeth Lowndes*, and to *Thomas Lowndes* the sum of 3,000*l.*, upon trust to invest the same in government or real securities, and pay the produce into the proper hands of *William Hook* during his life, for his support and maintenance, so that he might not anticipate or incumber the growing payments; the testator also bequeathed two other sums of 3,000*l.*, in the same manner, in trust for two

(e) *Supra*, p. 1254; 3 Ves. 10.

(g) 15 Ves. 301.

(f) 12 Ves. 461.

other children of the name of *Hook*. The testator died in *December*, 1806, and his wife *Elizabeth* died in the *February* following intestate, to whom her daughter *Elizabeth*, who was an adult, administered. It did not appear that *Elizabeth Lowndes*, the widow, had any other provision than that arising from the 20,000*l.*, and the infants, the *Hook's*, who were the testator's natural children, were wholly unprovided for, except by the will. Upon the question, whether the widow was entitled to interest upon the 20,000*l.* and the infant natural children upon their respective legacies from the *death* of the testator; it was decided that neither the wife nor the infants were so entitled; the Lord Chief Baron *Macdonald* observing with respect to the natural children, "It is clear that by law they are strangers to the testator. In *Beckford v. Tobin*, Lord *Hardwicke* conceived that the testator, by directing maintenance out of the interest, intended that interest should be given from the death. But in this case there is no *scintilla* of intention to be collected from the will, as there was there from the codicil."

Where the legacy is contingent, or time of payment future, no interest given, and the legatee is the wife of the testator.

The preceding case was recognised and approved in the case of *Raven v. Waite* (*h*), where the reader will find the general rule respecting interest on legacies, and some of its exceptions clearly and pointedly stated by Sir *Thomas Plumer*, M. R.

2. As to *natural children* (*i*), the preceding case of *Lowndes v. Lowndes* has settled, that a natural child is not entitled to interest from the death of the testator, on a general vested legacy, where nothing is said by the testator as to the time of payment: and it is presumed that a similar decision would, upon the same principle, be made in the case of a legacy payable upon a future event; for the natural child being considered at law a stranger, the general rule before noticed must be equally applicable to them as to other strangers.

2. Where a natural child of the testator.

3. With respect to *grandchildren*. Lord *Alvanley*, in the case of *Crickett v. Dolby*, said, that a grandchild was always considered the same as a child within the view of the above exception; but in this *dictum* his Lordship was not accurate; for it

3. Where a grandchild of the testator.

(*h*) 1 Swanst. 543, 557, *supra*, p. 1271.

(*i*) With respect to the stock standing in an infant's name, the statute 11 Geo. 4, and 1 Wm. 3, c. 65, s. 32, authorizes the application

of the dividends for the maintenance, education, or benefit of the infant by an order upon petition of the guardian, if any, if not, by an order to be made in a cause depending in the Court, *vide infra*, Sec. viii.

Where the legacy is contingent, or time of payment future, no interest given, and the legatee a grandchild of the testator.

appears that a distinction has long been, and is still, made between children and grandchildren upon this subject, the Court having refused to allow, on the ground of their relationship to the testator, interest upon their legacies before the time arrived which was appointed for their payment. The rule, as now settled may be thus stated and divided: where a legacy is given to grandchildren upon a contingent event, or payable at a future period, and the will does not give them interest or maintenance in the meantime, *interest* will not accrue upon the legacies until the time of payment of the principal; nor will interest in the shape of maintenance be allowed them, merely on the ground of their *relationship* to the testator (*j*).

A.—For where in such cases the legacy is given over to others whose consent, by reason of infancy or otherwise, *cannot* be obtained, there maintenance will not be allowed, although the legacy carries interest until the time of payment of the principal (*jj*); and although the father be not of ability; for in such case it would be to give for the maintenance of one person the property of another.

B.—But the rule is otherwise where the consent of the legatees ultimately entitled *can* be obtained.

C.—Or where the legacy is not given over, and the grandchildren, or indeed any other infant legatees (strangers to the testator), compose a *class*, all or some of whom must absolutely take the fund; all having an equal chance of taking or being survivor, and having a present interest (*k*): for there the Court will allow interest in the shape of maintenance, if the father be not of ability to maintain them (*l*).

A.—Where consent of legatees over *cannot* be obtained.

A.—And *first*, as to those cases, where consent *cannot* be obtained.

Thus, in *Haughton v. Harrison* (*m*), *Thomas Haughton* bequeathed 500*l.* to be paid to his grandson *T. Price*, the son of *Mary Price*, if he lived to the age of twenty-one, but if not, then to the other child or children of his daughter equally arriving to

(*j*) See *Stewart v. Garnett*, 3 Sim. 398, 467, *infra*, Ch. XXI. Sect. II.

(*jj*) As in the legacy in *Errington v. Chapman*, *infra*, p. 1278.

(*k*) See per Lord Eldon in *ex*

parte Kebble, *infra*, p. 1277.

(*l*) See the rule as stated by Lord Eldon in *Marshall v. Holloway*, 2 Swan. 436.

(*m*) 2 Atk. 329.

such age, and gave the residue of his personal estate to the plaintiff. After the testator's death, *T. Price* died under twenty-one, and there being no child of *Mary Price* born or living at the decease of the testator, the plaintiff insisted, that the 500*l.* became part of the residue to which he was entitled; but if the Court was of a different opinion, he then contended, that the two other children of *Mary Price* were not entitled to interest before their ages of twenty-one. Lord *Hardwicke*, C., said, "It is plain the grandchildren born after the testator's death, are entitled, for as they were not *in esse* in his life, the testator must have had in view future children of his daughter. But I am of opinion, they are not entitled to interest, though I would help them if I possibly could. If this legacy had been left upon no condition, but to be paid to *T. Price*, at his age of twenty-one, and not given over, then it would have been a legacy vested and transmissible, but still no interest could have been demanded, unless it be in the case of a child who had no other maintenance or provision; for a parent is bound by nature to support a child, but this has not been carried so far in the case of *grandchildren*. But here it is still stronger, for this is not a vested legacy, for in case *T. Price* died before twenty-one, it is given over. The words 'equally arriving at the age of twenty-one,' must be construed agreeably to the other words, and therefore it will still remain a doubt whether anything vests till twenty-one; but I shall not now determine this, and will only direct the 500*l.* to be placed at interest, and to be paid in the meantime to the plaintiff. And if the child or children of *Mrs. Price* arrive at their ages of twenty-one, then the principal sum to be paid to them and interest from the time it becomes payable."

Where the legacy is contingent, or time of payment future, no interest given, and the legatee a grandchild of the testator, and the consent of the legatees over cannot be obtained.

So also, in *Butler v. Freeman* (n), the grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, gave the residue of his personal estate to his grandson (the plaintiff) at twenty-one, and if he died before that age, then to the defendant *Freeman*, whom he made executor. The plaintiff filed the bill for the interest of the residue during infancy; but the defendant *Freeman* insisted that the plaintiff was not entitled to it unless he attained twenty-one, and that if the plaintiff died under twenty-one, he, the defendant, was entitled to it, with the residue. *John Butler*, the plaintiff's father, insisted, that the residue must be confined to what the testator left at his death, and that the

(n) 3 Atk. 58; *Elton v. Elton*, *supra*, 568; also *Perry v. Whitehead*, 6 Ves. 546.

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, and there are legatees over whose consent cannot be obtained.

interest after that period ought to be considered as undisposed of, which he claimed as the testator's next of kin; but if the Court thought otherwise, he then claimed the interest for the maintenance of the plaintiff. Lord *Hardwicke* said, "The plaintiff is not entitled to the interest which arises from this residue; and though the words *rest and residue* must be confined to what shall be found at the death of the testator, after his debts, funeral expenses and legacies, are paid; yet that the interest ought to accumulate till the plaintiff arrives at twenty-one, and as often as it amounts to a competent sum, to be placed out by a trustee appointed by the Master. I am not quite so clear how this interest would go, if the accident should happen of the plaintiff's dying before twenty-one, whether to the representative of the plaintiff, or to the defendant *Freeman* (o); and if there had been occasion, I should have been glad the cases had been looked into, and argued over again; but as this question may never arise, since the plaintiff may live to be twenty-one, there is no necessity for another argument at present. As to the defendant *John Butler*'s claim, I am of opinion, he has no right to the interest, because the testator has given all the *rest and residue* of his personal estate, so that he cannot be said to have left any part undisposed of, and consequently can have no title to it as next of kin, under the Statute of Distribution; for as the devise of the residue is contingent, it not vesting till the grandson's age of twenty-one, the interest is so likewise, and must accumulate in the meantime; nor can the defendant *Butler*, by the rules of this Court, entitle himself to it as maintenance for the infant; because it is given by a grandfather to a grandson, upon a contingency of his attaining twenty-one; and as nothing is said how the produce of it shall be applied, he is not entitled, as a grandson, to be maintained out of the produce" (p).

Again, in *Lomax v. Lomax* (q), a petition was presented for maintenance out of the interest of a legacy to the children of the testatrix's daughter, when the youngest should attain the age of twenty-one: Lord *Eldon*, in rejecting the petition, said, "Upon a legacy when they shall attain twenty-one, and to such of them as shall attain twenty-one, is not the meaning that such as do attain twenty-one shall have it at that time; and what right has the Court to give the interest before that time? If all

(o) See *Green v. Ekins*, 2 Atk. 476, note 3, stated *infra*. Sect. x. subsect. 2.

(p) See also Lord *Eldon*'s obser-

vations in *Perry v. Whitehead*, 6 Ves. 547; *Ellis v. Ellis*, 1 Scho. & Lef. 1. (q) 11 Ves. 48.

die under twenty-one, and a child not yet in existence should come into existence and attain that age, that child clearly would take the whole, interest as well as principal. Therefore I may give it to those children who may never become entitled to it."

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, and there are legatees over whose consent *cannot* be obtained.

So, in *ex parte Kebble* (r), a petition prayed an order for maintenance on behalf of five infants, to whom a residue was bequeathed, with survivorship among them in case of the death of any under the age of twenty-one; and in case all of them should die under that age, the whole was given to their sister, who took no interest directly in that residue; but a legacy was given to her by the same will, and in case of her death under twenty-one, that legacy was given over to the other five children. The will gave no direction for maintenance. Lord *Eldon* refused to make the order, observing, "The case in which maintenance has been allowed, though not given by the will, is where there are children, some or one of whom must take the property, and all have an equal chance by surviving, and a present interest. But it cannot be done if there is a gift over, or if the children are not all the persons among whom it is to go; as in Sir *Frederick Eden's* case, where Lord *Rosslyn* had directed it: but upon an application for an increase of the allowance, I did not think myself justified in following that, and refused it, as those children might not be the persons to take the whole; but future children, then unborn, might be the persons to take a part of it." Lord *Eldon's* reason for not granting the order in the case before him was, that as the fund was given over to the sixth child, in the event of the others dying under twenty-one, if that event were to happen, the five would, if the order were made according to the petition, be maintained at her expense, for she had no interest in common with them, while the gift over remained contingent. Upon a subsequent day, his Lordship adhered to his former opinion; observing, "The case of *Fairman v. Green* (s) is not within the former cases; in which the gift over was to the children who should survive, and therefore maintenance was given, the chance being equal; but in that case, as in this, all the children might die under twenty-one, and none of them might take. The former cases, after great struggle, go this length, that where there are equal legacies to a class of children, even with a direction for accumulation, the principal with the

(r) *Ib.* 601; see also *Turner v. Flower*, 7 *Ib.* 523.
Turner, 4 *Sim.* 430; *Cannings v.* (s) 10 *Ves.* 45, stated *infra*, 1285.

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, and there are legatees over whose consent cannot be obtained.

Notwithstanding the legacy bears interest, and the parent not of ability.

accumulation to be paid at twenty-one, with survivorship, in case of the death of any under that age, to the others, the chance of all taking or the survivor being equal, the Court takes the fund, which belongs to all, and must go to all or some of them, and maintains them all out of the interest. But the principle cannot be applied where the legacy is not given absolutely to the children and the survivor, but in case of the death of a child under twenty-one, there is a limitation to the issue, who for that purpose are strangers."

Nor, as before stated, will interest be allowed before the time of payment of the principal, although the legacy is directed to bear interest, and although the parent be not of ability to maintain his children.

Thus, in *Errington v. Chapman* (t), which is the last case we shall adduce under the present head, the testator, *Thomas Errington*, directed his trustees, out of the residue of his personal estate, to pay to his granddaughter, *Ann Errington*, when and as soon as she should attain her age of twenty-one years, the sum of 1,000*L.*, with interest for the same from the expiration of twelve calendar months next after his decease; but in case she should die, without issue, before that age, then to pay the said sum of 1,000*L.*, with interest and produce thereof, unto his grandson, *Thomas Errington*, when and as soon as he should have attained his age of twenty-one years; and that his trustees should pay all the remainder of the residue unto his said grandson, *Thomas Errington*, in like manner; and if he should die, without leaving issue under twenty-one, then to his said granddaughter as before: but in case both of them, his said grandchildren, should die without leaving issue before they attained twenty-one, then the testator directed his trustees to pay and assign the said legacy of 1,000*L.* and the residue, with the interests and proceeds thereof respectively, in moieties; one to the children of the testator's son, *Robert Errington*, and the other moiety to the children of his daughter, *Mary Errington*. A bill was filed on behalf of the infants, *Thomas* and *Ann Errington*, against the executors for an account, and praying that the plaintiffs might be declared entitled to have a proper sum allowed for their respective maintenance and education, to their father during their minorities, out of the interest and dividends of the legacy and residue. Sir *William Grant*, M. R., dismissed the petition; observing, that the question there was not, whether a legacy

to a grandchild, payable upon a contingency or at a future period, should carry *interest*; for in that case interest was given; but the question was, whether the interest was payable at the same time as the legacy, and to go over on the same event; and he determined that it was: and that as the two grandchildren had not the legacy given to them absolutely, and in all events, but it was given to other grandchildren, it did not fall within the principle of *Greenwell v. Greenwell*; in which case there was no consent, all being infants; but the fund was to go among all. His Honor concluded by observing, that this was a hard case, as it was stated the father was not of ability to maintain his children (*u*).

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, and there are legatees over whose consent cannot be obtained.

B.—We proceed to the *second* branch of the foregoing rule respecting grandchildren.

B.—Where the consent of legatees over can be obtained.

That where legacies are given to grandchildren of the testator, or indeed to any class of infant strangers to the testator, upon a future or contingent event, and the will is silent as to interest or maintenance, and the legacy is given over to others, whose consent *can* be obtained, then the Court will allow interest in the shape of maintenance.

Thus, in *Cavendish v. Mercer* (*x*), *Richard Bradshaw*, among other funds, bequeathed to the plaintiffs, the children of his only child, *Sarah*, the wife of *Henry Cavendish*, the following legacies: “to *Richard Cavendish*, 8,000*l.*, to be paid at twenty-one, but without interest in the meantime, and in case of death under that age, to sink into the residue; to *Catharine, Deborah, and Sarah Cavendish*, 10,000*l.* each; and to *T. M. Cavendish*, 3,000*l.*, to be paid at twenty-one, or marriage, with consent, &c., but without interest in the meantime; and in case of death, or marriage without consent, to sink into the residue:” and, after giving other legacies, he bequeathed the residue of his personal estate, upon trust, to place out at interest to accumulate, and to make over all the funds and accumulations to his grandson, the plaintiff, *Augustus Cavendish*, upon attaining twenty-one; but in case he should die under that age, then upon trust for his grandsons, the plaintiffs, *Richard and George Cavendish*, equally, at their respective ages of twenty-one; but if either should die under that age, in trust for the survivor; in case of the death of all three grandsons, in trust for his granddaughters, at twenty-one,

(*u*) See *Errat v. Barlow*, 14 Ves. 202, wherein the doctrine of the preceding cases was confirmed.
(*x*) 5 Ves. 195.

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, and there are legatees over whose consent can be obtained.

or marriage, with consent, &c. And if all his said grandchildren died before the times appointed for enjoying such funds and securities to be purchased with such residue, together with such accumulated funds and interest, he then gave the same unto his said daughter, *Sarah*, absolutely. And until all, or some, or one of his grandchildren, should become entitled to the funds by virtue of his will, upon trust, to receive all the dividends and interest, and invest the same from time to time at interest to accumulate, and stand possessed of the accumulation, in trust for the person or persons who should be entitled to the funds to be purchased with the residue. The defendants, *Henry Cavendish*, and *Sarah*, his wife, stated by their answer, that *Henry* took out administration with the will annexed, that they were desirous that the whole, or part of the interest of the said legacies, should be applied in the maintenance of the plaintiffs, inasmuch as the defendants had a large family of children, consisting of the plaintiffs and one other child since born, for whom no provision was made by the will, and the net annual income of the defendant's estate was 1,100*l.* a year, exclusive of an annuity of 700*l.* a year, which his father paid him so long as his father enjoyed a place under the Crown; and therefore the defendant could not maintain the plaintiffs in proportion to their fortunes. Lord *Loughborough*, C., made the usual decree for taking the accounts, and ordered, that the Master should, *if the defendant, Mrs. Cavendish, should appear before him, separate from her husband, and consent thereto*, inquire into the circumstances of the defendant, *Henry Cavendish*, and whether it was proper to make any, and what allowance for the maintenance and education of the plaintiffs, the infants, and state the same, with his opinion thereon, to the Court. The Master, by his report, in 1776, stated, that it would be proper to allow certain sums therein for the maintenance; which report was *confirmed (y)*.

The order made in the cause of *Fendall v. Nash (z)*, recited that *William Fendall*, *Mary Fendall*, *John Fendall* the younger, and *Harriet Fendall*, the only children of the defendants, *John Fendall* and *Sarah* his wife, upon the 18th of *December*, 1779, preferred their petition, stating that *Mary Bolde*, late grandmother of the plaintiffs, by her will in 1759, after several pecuniary and specific legacies, gave all the rest of her personal estate to

(y) See his Lordship's observations in regard to the report being confirmed in *Greenwell v. Greenwell*,

5 Ves. 199.

(z) 5 Ves. 197, note.

Joseph Nash and *John Barnes*, in trust, to place out at interest, upon real or government security, and to improve the same from time to time; and that after the decease of the survivor of *John Fendall* and *Sarah* his wife, and not before, the trustees should pay such residue, together with the interest and improvement, to all the children of her daughter, *Sarah Fendall*, as should be living at the decease of her and her husband, *John Fendall*, equally, if more than one: if but one, the whole to such one, to be paid to sons at twenty-one, and to daughters at twenty-one, or marriage; and in case any such child or children should die before his, her, or their share of her personal estate should become payable, without issue, then that the share of such child so dying, should go to such surviving children, to be divided among them, as aforesaid, and to be paid as their original shares; and in case, at the decease of her said daughter and her said husband, any child of her daughter should be dead, or should afterwards die, before his or her share should become payable as aforesaid, leaving issue, then the share of such child should go to such his or her issue; but in case the testatrix's said daughter should leave no child living at her death, nor any issue of such child or children, or, in case all and every such child or children should die without issue, before their shares should become payable, then to pay one-half of the residue to the defendant, *William Nash*, and the other half part to the defendant, *Joseph* ———, and she appointed her trustees executors. By the decree made in *May*, 1761, the accounts were directed. By the Master's report of *March*, 1764, it appeared that the residue consisted of 25,780*l.* Bank annuities, 3*l.* 10*s.* *per cent.* of 1758, and that *John Fendall* had become partner with ——— *Lodge*; and a commission of bankruptcy issued against him in *February*, 1778; by which the defendant *Fendall* and his family were reduced to almost absolute indigence. By an order made in *June*, 1779, it was referred to the Master, to see if it was for the benefit of the petitioners to make any and what allowance to each of them respectively for their maintenance and education, and from what time. The Master, by his report, in *December*, 1779, stated the bankruptcy of *John Fendall*; and that the plaintiff, *William Fendall*, his eldest son, was of the age of twenty-one; *Mary Fendall*, twenty; *John Fendall*, the younger seven; and *Harriet Fendall*, four; that *John Fendall*, the father, had by the means aforesaid, become utterly incapable to maintain and educate his said children; and that none of them had fortunes, except under the will; that *William* was a student of the *Temple*, and intended

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to be placed under a special pleader; the second son was a writer in the *India* Company's service; and that the two daughters lived with their father; and that it was proposed on the part of the children, that an allowance of 200*l.* a year should be made for the maintenance and education of *William* and *John* respectively, for the time past, from the 1st of *February*, 1778, and for the time to come; and that 100*l.* a year each, should be allowed for the maintenance and education of *Mary* and *Harriet*, and that *William Nash* and *Joseph* —, who had, since the decree, attained twenty-one, *had consented to such allowances*, and the plaintiff, *William Fendall*, who was of age, had in like manner signified his *consent* to his brother and sisters having such allowances; and, as *John Fendall* the father, appeared to be totally unable to provide a proper support, maintenance and education, for his said children, and they had no present fortune or means of livelihood or subsistence or of education, the Master stated that he conceived, it would be for the benefit of the petitioners respectively, that an allowance should be made for their respective support, maintenance, and education, out of the interest from the 17th of *March*, 1778, the time of their father's failure, *viz.*, 200*l.* a year for the support and maintenance of the petitioner, *William Fendall*; the like sum for the petitioner, *John Fendall*; so as such respective sums did not exceed at any time the interest or dividends of one-fourth part of the said capital sum of 25,780*l.* Bank annuities; the sum of 100*l.* a year for the support and maintenance of the petitioner *Mary*; and 50*l.* a year for the maintenance and education of *Harriet*. The prayer of the petition was, that the report might be confirmed; and the order was, that the report should be confirmed, *William Nash* and *Joseph* — consenting (a).

In the later case of *Evans v. Massey* (b), a fund, bequeathed by will, was directed to accumulate till two infants should attain twenty-one, deducting annually from the interest such portion as might be necessary for their education and other expenses, with benefit of survivorship, in case of either dying under twenty-one; the shares to be vested at twenty-one. The Court (with the consent of the parties to whom the fund was given over) directed an advancement for the purchase of a commission for one of the infants, but with considerable hesitation.

(a) Lord *Eldon* doubts the propriety of this decision; see his observations in *Errat v. Barlow*, *infra*.

p. 1286.

(b) 1 Young. & Jerv. Exch. R. 196.

C.—In proceeding to the *third* branch of the above rule, we repeat that where the legacy is not given over, and the grandchildren, or indeed any class of children (strangers to the testator) compose a class of legatees, all or some of whom must absolutely take the fund, all having a common interest in it, an equal chance of taking or being survivor, there the Court will allow interest in the shape of maintenance, if the father of the legatees be not of ability to maintain them.

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, all having a common interest in the fund.

We shall introduce this class of cases by that of *Greenwell v. Greenwell* (c). The reader will observe that the application for maintenance seems by the printed reports to have been made only on the part of the grandson *John Greenwell* the first legatee, and not on behalf of the ultimate legatees the three granddaughters of the testator and sisters of *John Greenwell*. The decision, however, is referred, by Sir *William Grant*, in *Errington v. Chapman* before stated, to the principle now in discussion.

In the case of *Greenwell v. Greenwell*, *Nicholas Greenwell*, by his will in 1793, devised to trustees all his real estates in trust for his grandson *John Greenwell*, until he should attain twenty-one; at which age the testator gave all his said real estates to him in fee with power to his trustees to let all or any part during the minority of his grandson, and to receive the rents for the use and benefit of his grandson; and he directed his trustees to place out at interest the rents and profits which, with the interest, should accumulate until his grandson attained twenty-one, when the same were to be paid to him; but if he died before twenty-one, then the rents and profits, and the interest with the accumulations thereof, were to be in trust for the testator's three granddaughters, *Mary*, *Hannah*, and *Elizabeth Greenwell*, equally to be paid upon their attaining twenty-one or marriage; and he declared, that if his grandson should not attain twenty-one, his said real estate should be in trust for his said three granddaughters in fee, as tenants in common, and they were to be entitled to their respective shares thereof upon attaining twenty-one or marriage. The testator died in 1794; *John Greenwell* his son, and father of the children named in the will, died in his lifetime, leaving a very inconsiderable property; and bequeathed such property to his wife, who married again; and upon the death of her second, married a third husband, who was not in circumstances to maintain and provide for the testator's grandson. The bill was filed on behalf of the grandson, an infant, praying,

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that a guardian and receiver might be appointed, and a suitable allowance made to the plaintiff for maintenance and education out of the rents of the trust estates, and that the residue of the rents might be secured and laid out, &c. and an account directed against the trustees. Upon the second hearing, the case of *Fendall v. Nash* was cited for the plaintiff, and Lord *Loughborough* said, "The order of Lord *Thurlow*, in that case, is exactly to the same effect, and under the same circumstances, as in *Cavendish v. Mercer*; taking the *consent* of the persons who would be ultimately entitled in the event of the death of all the children. I think myself sufficiently warranted to make the decree you pray, and there is no occasion for a reference. I judge that it is for the benefit of the children. I must direct the Master to settle what is proper to be allowed for the maintenance for the time past since the death of the testator, and for the time to come, and to appoint a guardian."

Again, in *Collis v. Blackburn (d)*, *James Collis* directed his executors to invest the monies arising from the sale of his real and personal estate, after payment of debts and legacies, in government securities, and out of the produce to pay certain annuities to his three daughters, and to his son *John Collis* and others, and subject thereto, to lay out the interest, &c. on government securities, to accumulate to be a fund for the legacies after given, and to be eventually divided between the several persons who, as after mentioned, might, by survivorship, be eventually entitled to the same. The testator then directed the executors to transfer to each and every of his grandchildren (except two, naming them) who were then living, so much of the said trust monies, as would produce 200*l.* to each, such transfer to be made to them respectively, when and as they should respectively attain the age of twenty-one years, or on the day of marriage (if females), but without interest in the mean time: and as to all the residue of the said trust monies, which should remain after the death of the said several annuitants, and payment of all arrears of their annuities and the legacies before given, upon trust to transfer and divide all such trust monies, &c. among the before named legatees (naming them) who should be then living, *share and share alike*. After the death, the bill was filed by the grandchildren to have the will established. The Master's report stated the sums that had been expended upon the maintenance of the grandchildren by their respective parents, and that the

parents were not of ability. The cause coming on for further directions, maintenance was decreed for the grandchildren upon the authority of *Greenwell v. Greenwell* before stated.

The case of *Fairman v. Green* (e) seems also referable to the present class of cases; so far at least as respects the legacies which the legatees took under their grandfather's will. In that case, *Joseph Fairman* the father devised his real estate to his eldest son *Joseph*, in fee, and gave the residue of his personal estate, including 1,000*l.* given in trust for his wife for life, to his three younger children equally, to be paid at twenty-one or marriage, directing his wife during widowhood to receive the rents of his real estate, and the dividends of his childrens' fortunes, during their minorities, and if she married again, his executors were to apply the same, as they should think proper, for maintenance, and accumulate the surplus to increase their fortunes. The father died in 1794, leaving his widow and four children, *Joseph*, *John*, *Samuel* and *Elizabeth*. *Joseph Fairman* gave his real estate to his grandson *Joseph*, in fee, the rents to accumulate during his minority, but if he should die under twenty-one, and without leaving issue, then the testator gave the rents of the estates to his three other grandchildren, equally at twenty-one, the interest to be applied for their respective uses in the mean time. The testator also gave to his four grandchildren 500*l.* each, to be paid at their respective ages of twenty-one, and he gave the residue of his personal estate to his grandson *Joseph*, to be paid at twenty-one; and he directed his executors to place out the several legacies in government securities, to receive and lay out the dividends from time to time in government securities, for their respective benefits, until the said legacies should become payable, and to be transferred to them with their original legacies; and, in case of the death of either of the infants under age without leaving lawful issue, the legacy and accumulations of the deceased to go to the survivors equally, share and share alike; and to be paid and transferred to them respectively as their original shares, and the dividends to be laid out in the mean time as aforesaid; and if any of his said grandchildren should die leaving issue, such issue should be entitled to the deceased parent's share. *Joseph Fairman* the grandfather died in 1800: a petition was presented to confirm the Master's report approving a proposal for maintenance; but Sir *William Grant*, M. R., directed a bill to be filed. The bill was accordingly filed by the

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(e) 10 Ves. 45.

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infant grandchildren, praying, among other things, that it might be declared upon the will of the grandfather, that the interest of the legacies of 500*l.* each given to the plaintiffs, and the interest of the residue of his personal estate given to the eldest son, were applicable to the maintenance of the plaintiffs during their minorities, and that no accumulation thereof was to take place till such maintenance had been provided for out of the interest. The Master's report stated the amount and income of the property; that the defendants, since the death of their father, had been maintained and educated by their mother, who was a widow, and that he approved of the proposal for the application of 250*l. per annum* from the death of the grandfather for the maintenance of *Joseph* out of his annual income, upwards of 600*l.*; and 54*l. per annum* for the other children, being the amount of the dividend upon their legacies from their father and grandfather, with the accumulation; conceiving that the intention of the grandfather was that a proper part of the interest should be first applied for maintenance, and that there should be no accumulation till after maintenance deducted. Sir *William Grant*, made the order accordingly; observing that if the eldest son were to die, the younger children would have maintenance under their grandfather's will. Therefore they were not all equal, as in the cases (*f*) cited. That his doubt was, whether it was ever done upon a petition, if the infant had not the absolute interest. It could be only upon this equitable ground, that if the Court would not interfere, the other children would be just in as bad a situation.

In *Errat v. Barlow* (*g*), a reference was made to the Master, to inquire whether the father of the infants, entitled under a bequest of 5,000*l.* charged upon real estate, upon trust for the younger children of the testator's daughter, *E. Errat*, to accumulate during their minority, and payable equally among them, at their ages of twenty-one, was of ability to maintain them; the Master reported that the father was not of ability. Lord *Eldon* observes, "I have looked through all the cases upon this subject. When *Greenwell v. Greenwell* (*h*), was first stated, the observation made by Lord *Rosslyn* was, that the application to him was to make a will for the testator: but two cases were produced upon that occasion. As to the case of *Cavendish v. Mercer* (*i*), where

(*f*) *Greenwell v. Greenwell, Cavendish v. Mercer*, and *Fendall v. Nash*, stated *supra*, pp. 1283, 1279, and 1280.

(*g*) 14 Ves. 202.

(*h*) *Supra*, p. 1283.

(*i*) *Supra*, p. 1279.

there is an express direction for accumulation, it is strong to say, that direction shall not have effect. That was a case, however, in which, if I collect the effect of it right, the father, the mother, and the children, had among them the title to the property, that was to produce the interest. The children had, as among themselves, an equal chance to take the capital with the accumulation; and the mother, who was entitled under the limitation over, consented to the application. That case, therefore, is an authority only, that, where the Court sees that it is for the benefit of the infants, the chance of surviving being equal, and can procure the consent of all persons interested, the Court will take the chance of controverting the direction of the will. As to the case (*k*), before Lord *Thurlow*, I cannot bring myself to think that case properly decided; as, upon certain contingencies, both the principal and the interest would have gone to individuals, who, not only did not, but could not, consent, not being then in existence. In the event of the death of a child, under the age of twenty-one, leaving issue, the accumulated property would have gone to that issue; and how the Court could give to the infants that property, which in that event would belong to others, I cannot conceive. The result is, that, if the chance of surviving is equal among all, and no other interest, that, upon any contingency, would take effect, will be defeated, maintenance shall be allowed out of the interest; but it is impossible to give it, where, in any event under the operation and construction of the will, that interest may possibly belong to other persons. In this case, future children coming into existence, may take shares: but it is not stated, to whom this property is to go, if all the children should die under the age of twenty-one. The petition must therefore stand over, until I can see the will."

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, all having a common interest in the fund.

In the case of *Haley v. Bannister* (*l*), the question was, whether maintenance could be allowed, the father not being of ability, although the mother had a competent separate estate: it involved the doctrine laid down in the preceding cases, the legatees being a class of grandchildren, having a common interest in the fund; for had the fund been given over to other legatees, maintenance could not have been given without consent. In that case, a reference having been made, in pursuance of a previous order to inquire whether the defendant, *Aylmer Haley*, was of ability to maintain and educate the plaintiffs, his infant children; and, in case he was not, to state what would be a proper allowance, and

Maintenance allowed, notwithstanding the separate estate of the mother.

(*k*) *Fendall v. Nash*, *supra*, p. 1280.

(*l*) 4 Madd. 275.

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Maintenance allowed, the father not being of ability, but the mother having competent separate estate.

from what time, and out of what fund; the Master, by his report 30th *May*, 1819, found that all the property of *Aylmer Haley*, consisted only of an annuity of 180*l.* during his life, of which he was not then in the receipt; but that his wife *Amelia Haley*, was in possession of a separate estate to the amount of 1,300*l.* a year, subject to the annuity of 180*l.*; and that he was of opinion the said *Aylmer Haley*, personally, and independently of his wife, was not in circumstances and ability to maintain the plaintiffs, his infant children; and that, therefore, he had proceeded to consider the other parts of the reference, and found that the testator, *R. Bannister*, by his will, in 1812, devised certain estates after the decease of *Aylmer Haley* and his wife, to the use of all the children of his daughter *Amelia Haley* then born, or thereafter to be born, as tenants in common, and to their respective heirs for ever; and that the testator, by the first codicil to his will, directed that 6,000*l.* three *per cent.* consols, and 6,000*l.* three *per cent.* reduced annuities, should be purchased in the names of his executors, and that they should receive and invest the dividends so as to accumulate, until one of the said children should attain twenty-one, and upon his or her attaining that age, (if only one child who should attain that age) transfer the whole of the said two sums to such only child; and, if more than one such child then living, to transfer to such children one equal part of the said annuity and accumulations, in proportion to the number of such children then living: and he found, that in pursuance of an order, the two sums of 6,000*l.* had been carried over to the infant's separate account, and that there was standing on their separate accounts, the sums of 6,810*l.* 11*s.* 4*d.* three *per cent.* consols, and 6,688*l.* 19*s.* 11*d.* three *per cent.* reduced annuities; and in cash 100*l.* 6*s.* 8*d.* which had arisen from the said annuities; and that the plaintiffs, the children (five in number), were all infants, the eldest being only ten; that the present expense of educating and maintaining them, would amount to 230*l.* a year; but that to enable the father to live in a style suitable to the expectations of his children, he was of opinion it would be proper to allow 300*l.* a year for their maintenance and education, from the testator's death, 28th *December*, 1815, to 5th of *April*, 1819, and from that time an allowance of 50*l.* a year for each of the five children; and that, as it did not appear to him that the infants were entitled to any fortune in possession, except the said annuities placed to their separate account, he conceived that the sum in cash and a competent part of the annuities should be applied for that purpose, and that the sums of 50*l.* for maintenance

from the 5th April, and for the time to come, should be paid out of the dividends of the annuities. The residuary clause in the second codicil to the testator's will was as follows: "And instead of my daughter, *Amelia Haley*, being my residuary legatee, I make my executors residuary legatees in trust for the benefit of my said daughter *Amelia Haley's* children, whatever the residue may be; my executors will add to it, the other consolidated and reduced Bank annuities which I have left to my daughter, *Amelia Haley's*, children." Upon the question, whether maintenance could be allowed, the mother being of ability to maintain her children, Sir *John Leach*, V. C., observing that he believed the point was new, said, "The wife, during the life of her husband, not being under a legal obligation to maintain the children, I think this Court cannot take into consideration her separate estate. The next question is, whether, attending to the terms of this will, I can order maintenance to be paid to the father out of the property bequeathed to the children? I am of opinion I can; for I take the principle to be, that wherever the children have a common interest in a fund, the income of the fund, if necessary, may be applied to their maintenance. In this case, children born or to be born have a common interest, and therefore the income of the fund is in this case applicable to maintenance (m)."

Where the legacy is contingent, or time of payment future, no interest given, and the legatees are grandchildren, or other class of infant strangers, all having a common interest in the fund.

Maintenance allowed, the father not being of ability, but the mother having competent separate estate.

In *Billingsley v. Critchet* (n), it was held, that a mother married to a second husband was not bound to maintain the children of her first husband, but an allowance for that purpose was made out of their fortunes; the mother had a provision from her first husband, and a further estate from her own family.

It was however observed by Lord Commissioner *Ashurst*, that, had the widow remained unmarried, he should have entertained some doubt.

SECT. VI. Of interest where the legacy is contingent or payable *in futuro*, and though the interest is not expressly given, an intention to give it, in the shape of maintenance, fairly inferable.

A further exception to the rule that *interest* shall not be

With regard to interest.

(m) See also *Errat v. Barlow*, 14 Ves. 202; also *McDermot v. Kealy*, 3 Russ. 264, (n), where allowance out of a residue directed to be accumulated was made for the support of the legatee in the interval

between the period of the legatees' majority and that of distribution of the fund.

(n) 1 Bro. C. C. 268, before stated, p. 1266.

Where the legacy is contingent, or time of payment future, intention to give interest or maintenance inferred.

allowed, until the time of payment of the principal has arrived, occurs, where an intention, though not expressed, is fairly *inferable* from the will; for in that case it will be allowed from the death of the testator. In the following instances, it will be observed that the legatees are strangers, and the legacies not payable until a future period, and it does not appear that the testator placed himself *in loco parentis*.

Thus in *Pett v. Fellows* (o), the testatrix bequeathed to her cousin, *Phineas Pett*, the sum of 100*l.*; to her cousin, *Peter Pett*, 200*l.*; to her cousin, *Elizabeth Pett*, 1,000*l.*; “and in case any of the aforesaid three children, *Phineas*, *Peter*, and *Elizabeth*, shall die before the age of twenty-one, my intention being that their legacies shall be paid when they respectively attain those years, his or her legacy shall be equally divided between the survivors; and in case two of them shall die before the age of twenty-one, then the whole shall go to the survivor. I also give a power to my executors to apply any part of the aforesaid legacies towards the maintenance or education of the aforesaid three children, during their minority, as in their discretion they shall think fit.” The question being, whether the legacies should carry *interest*, and, if so, from what time, Lord *Eldon*, C., was of opinion, that the testatrix intended the legacies should carry interest, that she made them payable at twenty-one, for no other reason than that if one of them died, his or her legacy should go to the survivors, and it was admitted they had no other subsistence. It was accordingly decreed, that the executors should be accountable for interest from the death of the testatrix; that what had been paid for education and maintenance should be deducted, and what remained should be placed out in the funds, till the legatees came of age, and then to apply to the Court to have them paid.

So with regard to maintenance.

A similar exception is likewise made in allowing *maintenance* where it is not expressly given, but an intention to give it is fairly *inferable*; maintenance being in fact another name for the whole, or a proportion, of the interest on the legacy.

Thus in *Lambert v. Parker* (p), *Richard Swallow*, by will dated 1801, gave to his daughter, the plaintiff's mother, *during her life only*, an annuity of 200*l.* for and towards the *maintenance* of herself, and the education of her children, and to be applied by her for that purpose. The annuity was given for her separate

(o) 1 Swanst. 561, note.

(p) Coop. 143.

use, and not to be subject to the debts, &c., of her then present or any future husband; and after the decease of his daughter, the testator gave the sum of 5,000*l.* to all and every the children of her body lawfully begotten, *when* and as they should respectively attain twenty-one, equally; and in case one or more of such children of his said daughter should die before the attainment of that age, the share of the child so dying was to go and be paid among the survivors, share and share alike, and as such survivors should attain their respective ages of twenty-one; and if only one should attain that age, then the whole to be paid to such one child; but in case no such child should attain the age of twenty-one years, then the testator directed the legacy should *cease*, and sink into the residue. Upon the petition of the infant children for maintenance, Sir *William Grant*, M. R., in giving judgment, observed, "The strong argument in support of maintenance is, that the testator has expressly given it during the mother's life; and it is extremely improbable, therefore, that he intended the children should be without any provision, in case she died leaving them under age. I think, therefore, there is a fair inference, from the whole of this will, that the testator's intention was to give maintenance. The words 'when' and 'as' do not suspend the gift, but only the time of payment. There is, too, certainly, something in the argument (*q*), founded upon the word 'cease' used in the will."

Where the legacy is contingent, or time of payment future, intention to give interest or maintenance inferred.

In *Boddy v. Dawes* (*r*), the testator gave legacies out of a sum of stock, separated from the general residue, to the grandchildren named in his will, on their attaining the age of twenty-one; and if any should die under that age, his will was that their *portion* should be divided among the survivors; but if all should die under that age, he gave the *interest arising* to their father for his life, and after his death over. Lord *Langdale*, M. R., thought it a reasonable inference from the whole will, that the testator intended to give intermediate interest to the grandchildren. His Lordship observed, that the testator directed in case all the grandchildren died under twenty-one, that the interest *arising*, not the interest which *had arisen*, from the whole legacy, should be enjoyed by the father; and he thought there was some weight in the argument from the word "portion."

(*q*) Per Sir *Samuel Romilly*.

(*r*) 1 Keen. 362.

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

SECT. VII. Of interest when given by immediate bequest for maintenance, and the *parent of ability* to maintain the child, not allowed to be so applied.

It is a general rule of the Court of Chancery, that if immediate interest upon legacies to children be given for their maintenance, not to permit such interest to be applied for that purpose, if the parent of the legatee, who is under a natural obligation to provide for him, be of sufficient ability; so that the interest will accumulate for the child's benefit until the principal becomes payable (r).

Thus in *Hughes v. Hughes (s)*, *Thomas Chamberlain*, by will, vested his estates in trustees to pay certain annuities; and, subject thereto, to pay the residue of the rents and profits, dividends, and interest, for the maintenance and education of the children of his three daughters, (except such of his grandsons as should be in possession of the real estates devised) in equal shares, until the youngest attained twenty-one; and if any of his grandchildren died before the youngest arrived at that age, who should have been married and left issue, the children were to have their parent's share. At the hearing of the cause, Lord *Thurlow*, C., refused to direct the Master to consider of a proper allowance for the maintenance of the younger children of the testator's daughters; holding that the residue of the rents, &c., was an accumulating fund for the benefit of the children, and to be paid to them when the estates became divisible; and that until it appeared that the parents were incapable of maintaining the children, he could not order any part of the rents, &c., of the estates to be so applied. Afterwards the defendants moved the Court to amend the minutes of the decree, by inserting a reference to the Master to consider of a proper allowance to the parents for the maintenance of the children; but Lord *Thurlow*, C., said, the practice was, to refer to the Master, to inquire whether the parents were of ability to maintain the children; if not, then to report what would be a proper maintenance, and this practice did not vary where a maintenance was directly given by the will, unless in cases where it was given to the father, under which circumstances it was a legacy to him. His Lordship referred it to the Master

(r) 3 Atk. 399; 3 Bro. C. C. 416.

(s) 1 Bro. C. C. 386; also *Butler v. Freeman, supra*, p. 1275, S. P.

to inquire into the ability of the parents to maintain the children; and afterwards, upon petition, sums were ordered to be allowed for that purpose to Dr. *Kennedy*, who was reported not of ability to maintain his children; but although the Master made the allowance from the date of the decree, the Lord Chancellor confined it to the date of the report (*t*).

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

In *Andrews v. Partington* (*u*), a grandfather bequeathed the residue of his estate to his grandchildren at twenty-one, and the produce in the meantime to the trustees for the maintenance of the legatees, and appointed four trustees, one of whom was the father of the grandchildren. One of the trustees had expended 400*l.* in the maintenance of the children, previous to the report as to the ability of the parent to maintain them; and the question was, whether he should be allowed the sum so advanced, and whether any maintenance should be allowed the children *before* the report; and Lord *Thurlow*, C., said, although where there had been a bigotted father, who would not educate the child in the Protestant religion, the allowance had been made to the trustees, it was contrary to all rules that the interest vested in the children, should be applied to their maintenance in the life of the parent. That this would amount to a gift to the parent of so much as should be necessary for the maintenance, and the father being a trustee can make no difference. He therefore ordered the reference to be only as to the ability of the parent to maintain and educate them suitably to their fortunes, and what would be necessary for the future maintenance of the children. But the reporter states, that afterwards, by the consent of the children in *England*, and adult, their proportions were ordered to be paid.

Such is the general rule, but it has been found by experience that a rigid adherence to it would in some instances be attended with inconvenience and injustice. The Court, therefore, has thought proper to admit exceptions, where, *first*, it would be a hardship upon the parent of the legatees and injurious to others of his children, who would take no benefit under the will: or, *secondly*, where the interest is given to the *father* himself for the maintenance of the legatees; in the latter case it being considered as a gift to the parent.

Exceptions, where refusal of maintenance would produce hardship.

(*t*) But maintenance will now be allowed for time past; see *Maberly v. Turton*, *infra*, p. 1303; 14 Ves. 499, except under special circum-

stances; *ex parte Bond*, 2 Myl. & K. 439.

(*u*) 3 Bro. C. C. 60.

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

1. Exception, where it would produce hardship.

1. Of the former, the case of *Hoste v. Pratt* (x) is an example. In that case *Jermyn Pratt* bequeathed all the residue of the money to arise from the sale of his real and personal estate to trustees, upon trust to place it out upon good security, and to apply all, or a sufficient part of the interest, for the maintenance, education, support, and bringing up of all the children of *D. Hoste*, by his then present wife, until they severally attained the ages of sixteen; and when they should have attained that age, in trust to pay, transfer, and assign the said residue, with the unapplied interest and dividends, to all the children equally; and if there should be but one child, then to such only child; and in case any of the children died under age leaving issue, such issue were to receive their parents' share at the age of sixteen, and the trustees were directed to pay the interest and dividends thereof in the meantime, to *D. Hoste* and *Margaret* his wife, for the maintenance and education of the legatees. Then followed an executory disposition of the residue and interest to *Margaret*, upon the event of the death of all her children under age, and without leaving issue. At the hearing of the cause, it was referred to the Master to inquire (among other things) whether the father was of ability to maintain such of his children as were then under the age of sixteen; and, if not, what was proper to be allowed for maintenance and education. The Master stated that the father had a clear income of 987*l.* 16*s.* 6*d.* a year; and upon further directions, one of the questions was, whether an allowance should be made for maintenance, regard being had to this circumstance, that by the birth of some of the children of *D. Hoste*, after the eldest had attained sixteen, they were excluded from the provisions in the will, and consequently from any maintenance under it. Against the allowance of maintenance *Andrews v. Partington* (y) was cited. Lord *Loughborough*, C., observed, "*Andrews v. Partington* goes a great way. This provision is manifestly intended for the benefit of the family. The ability of the father must depend upon the number of the children. It cannot be laid down as an absolute rule, that it has the effect of a legacy to the father. This family is increasing; and by refusing maintenance, I am accumulating for the children who take the whole of this property, and diminishing the funds the father has for maintaining the children I am obliged to leave unprovided for. I made an order for maintenance in the case

(x) 3 Ves. 730.

(y) *Supra*, last page.

of Mr. *Mundy's* (z) daughter, whose father was, beyond all doubt, of ability. I can only support the decision upon the first point, as to the vesting, upon the cases decided on the principle of convenience, and I should use the children who are excluded very ill, if I permitted the others to take out of the father's funds what might go to make up the loss arising from that decision. Refer it to the Master to consider what will be a proper allowance for the maintenance of these children, regard being had to the number of children of *D. Hoste*."

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

2. The other exception to the rule of not allowing maintenance where the parent is of ability, is, where the interest of the legacy is given to the father for the maintenance of the legatee; for in that case he will be allowed to apply it for that purpose in exoneration of his natural obligation; for such a gift is in fact a legacy to the parent.

2. Exception where interest given to the parent.

Thus, in *Brown v. Casamajor* (a), *Charles De Laet* bequeathed to *Humphrey Sibthorp* 7,000*l.*, the better to enable him to provide for his younger children; and if he died before, or the testator should be rendered incapable, in case of accident, to make any alteration, then he gave the 7,000*l.* to *Susannah*, the wife of *Humphrey*, for the purposes aforesaid; and if both died before him, he gave the same among the younger children. There were five younger children: and upon a reference to the Master, he by his report stated, that he had computed interest from a year after the testator's death, upon all the legacies except that of 7,000*l.*, and he submitted how *Humphrey Sibthorp* and his younger children were entitled as well to the interest as the principal of that legacy. By the decree made in *March*, 1799, upon further directions, it was ordered that *Humphrey Sibthorp*, consenting to secure the 7,000*l.* for his younger children, should lay proposals before the Master for the purpose, with liberty for any such children upon attaining twenty-one, to apply to the Court concerning their interests in that sum. No directions having been given as to the interests then due and to accrue in future upon the 7,000*l.* *Humphrey Sibthorp* petitioned the Court

(z) *Mundy v. Earl Howe*, *infra*, p. 1279, and see *Haley v. Bannister*, 4 Madd. 275, 280, stated *supra*, p. 1287; see also *Stocken v. Stocken*, 4 Myl. & Cr. 95; *ex parte Penleaze*, 1 Bro. C. C. 387, n.

(a) 4 Ves. 498; see *Berkeley v.*

Swinburne, 6 Sim. 613; in *Hadow v. Hadow*, 9 Sim. 438, the mother was held entitled, during the minority of the children, she properly maintaining them, to the income of a part of the residue applicable for that purpose.

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

that it might be declared that the security to be given by him for the 7,000*l.* was to be without interest, and that he was entitled to the interest then due for his own use and benefit. Lord *Loughborough*, C., said, he rather thought the petitioner was entitled to receive the interest; and that the interest being ordered to be paid to him, the security would be taken only for the gross sum of 7,000*l.* The order was, that so much of the interest upon the 7,000*l.* from the end of a year after the death of the testator, as had not been paid, be paid to *Humphrey Sibthorp*.

Where the parent takes as a trustee for his children.

Under this head a class of cases has occurred in which the parent was held to take the provision for maintenance as a trustee for his children.

In *Hawkins v. Watts* (b), which is very shortly reported, it is presumed the decision proceeded upon this ground. There the testator gave a share of his personal estate to his son-in-law, in trust, to apply the same for the maintenance and use of his children by the testator's daughter. Sir *L. Shadwell*, V. C., held the son-in-law was entitled to apply the interest of the share for his children's maintenance, notwithstanding he might be of ability to maintain them.

In *Wetherell v. Wilson* (c), the testatrix in exercise of a power, bequeathed stock to trustees in trust to pay the interest to her husband in order the better to enable him to maintain their children until their shares should become assignable to them; and if no children or none should live until their shares became assignable, then she gave the interest to her husband for life, and after his decease the principal to her next of kin. The father subsequently assigned all his personal estate for the benefit of his creditors, and the question was raised by a creditor whether the interest of the fund did not pass by the deed. But Lord *Langdale*, M. R., decided in the negative, and held that the trustees should pay the interest to the father, but that he was bound to apply it for the benefit of the only surviving child; and, therefore, he was not at liberty to assign it over to creditors.

Where the parents of an infant legatee are in indigent circumstances the Court will order an increase of the allowance for the maintenance of the infant so as to assist the parents.

(b) 7 Sim. 199.

(c) 1 Keen. 80; *Leach v. Leach*, 18 Sim. 304; *Bateman v. Foster*, 1 Coll. (C.), 118; see also *Woods v.*

Woods, 1 Myl. & Cr. 401; *Wood v. Richardson*, 4 Beav. 174; *Pratt v. Church*, Ib. 177; *Conally v. Farrell*, and *Conolly v. Butcher*, 8 Ib. 347.

In *Allen v. Coster* (d), the testatrix bequeathed 6,000*l.* stock to her executors and trustees in trust to pay the dividends to *G. A.*, to be by him applied for the maintenance and education of his son and daughter, until the latter should attain twenty-one, and then after setting apart sufficient to provide an annuity of 20*l.* a year for the benefit of *G. A.* and his wife for their lives to divide the principal equally between the son and daughter, with benefit of survivorship, if either died under twenty-one: after the death of the parents the sum appropriated for the annuity of 20*l.* was bequeathed to the children as before. The parents were in low circumstances; and, in consequence of their misconduct, the guardianship of the infants had been committed by the Court to other persons. The parents presented their petition to the Court submitting that, during the minorities of the children, they were entitled to the dividends, after properly providing for the maintenance and education of the children and on their behalf the authority of *Heysham v. Heysham* (e) was relied upon. It is not stated what amount the Court had previously ordered for the maintenance and education of the infants, but Sir *L. Shadwell*, V. C., was of opinion, that it was a case in which the Court could increase the maintenance of the children for the support of the parents; though, on account of the misconduct of the parents, he did it with reluctance; but without adverting to the construction of the will he thought he might give to the infants the benefit of the income of the property so as to assist the parents; to do so was evidently for the benefit of the infants.

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

3. We may in this place observe, that where the fund settled does not operate as a *bounty* to the children, but the maintenance provided for them, is part of the execution of a trust contained in a contract, as by settlement, to which the father is a party; the Court (notwithstanding the ability of the parent to maintain his children) will allow him the expense of their maintenance out of the produce of their fortunes.

3. So where the fund does not operate as a *bounty* to the children.

Thus, in *Mundy v. Earl Howe* (f), previously to and in consideration of the marriage of *Edward Mundy* with *Lady Middleton*, the whole of her ladyship's personal estate was vested in trustees, by settlement, in trust, as to part, after the death of *Lady*

(d) 1 Beav. 202.

(e) 1 Cox, 179.

(f) 4 Bro. C. C. 223; see also

Meacher v. Young, 2 Myl. & K. 490;

Stocken v. Stocken, 4 Myl. & Cr. 95.

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

Middleton, for the children of the marriage, in such shares, and at such ages and times, as her ladyship should, by deed or will appoint; and in default of appointment, for sons at twenty-one, and for daughters at twenty-one or marriage: and if there happened to be one only child, then for such child; with power for the trustees, after the death of Lady *Middleton*, out of the interests of the funds, to pay for the maintenance and education of the child or children for whom portions were provided, until such portions became payable, such yearly sum and sums of money as they his trustees should think proper, not exceeding the interest of the portions. There was one child of the marriage, *Elizabeth*, an infant; and Lady *Middleton* died without making any appointment. Mr. *Mundy* became entitled to 30,000*l.* by the will of Lady *Middleton*'s brother; and he having several children by a former wife, a question arose whether he should be allowed the interest of the funds provided by the settlement for *Elizabeth*'s maintenance, or whether, as he was of sufficient ability to maintain her and his other children, he should be at that expense out of his own fortune? Upon a suit instituted to remove this question, Lord *Loughborough*, C., expressed himself to the following effect: "In this case the child is entitled to the whole interest, but nothing is vested till twenty-one or marriage. It is perfectly clear, from the cases, that where the fund is given as a bounty, notwithstanding a provision for maintenance, the father, if of ability, must maintain the child; but in this case, it is part of the execution of the trust contained in the contract. The family of Mr. *Mundy* was in contemplation at the time of the contract, because there is a provision in the settlement, that they shall take nothing from Mr. *Mundy*, but by descent or gift. This was a provision made by contract for the children of the marriage with Lady *Middleton*, out of property, which, independent of the settlement, would have become Mr. *Mundy*'s. By the settlement, Lady *Middleton* was left in full possession of the dominion of her own property, even against her own children; and the trustees are required to apply, at a given period, a certain proportion of the interest as maintenance. The provisions in the settlement were beneficial to Lady *Middleton*, and acceded to by Mr. *Mundy*. The Master must therefore inquire what will be a proper maintenance; but I think there ought to be a direction to diminish that allowance in respect to the great additional fortune Mr. *Mundy* derives from Lady *Middleton*."

The principle of the preceding case of *Mundy v. Earl Howe*,

and of those referred to in the note, was discussed by Lord *Cottenham*, C., in *Thompson v. Griffin* (g); but in the latter case, the application of the father for maintenance out of the income of the child's fortune was rejected. There the wife's leasehold estate was, on her marriage, settled to her separate use for life, and after her death, upon the child, if only one, absolutely, but if more than one, then upon all the children, (except an eldest son) equally as tenants in common, sons at twenty-one, daughters at that age or marriage. The wife's freehold property was also settled to her separate use for life with remainder to her eldest or only son in fee, with executory limitations over in the event of his dying without issue, living at his decease. The settlement contained a power authorizing the trustees to apply the income of the property for the maintenance of the child or children *presumptively* entitled. The mother died, leaving an only child, a son, an infant. Lord *Cottenham*, C. held, that even supposing the provision for maintenance had applied to the existing circumstance of there being but one child, the father would not, upon that construction of the settlement, have been entitled to require the application of any part of the income of the child's fortune for maintenance, so long as he was of ability to maintain it; since there was no trust nor any contract for the benefit of the father in the settlement, to relieve him from the burden of supporting his children; there was merely a power, and to compel the execution of that power, would be going far beyond the other cases. His Lordship, however, was of opinion, that upon the true construction of the settlement, the power in the events which had happened did not exist.

Where immediate interest given for maintenance and parent of ability, it is not to be applied.

SECT. VIII. Of the application of Interest out of the Income of Property belonging to Infants for Maintenance, under the stat. 11 Geo. 4 and 1 Wm. 4, c. 65.

The ordinary jurisdiction of Courts of Equity, in allowing the income of the property of infants for their maintenance, as also in other matters for their benefit, has from time to time been extended by various acts of Parliament. These statutes, since the former edition of this work, have been consolidated and amended by the 11 Geo. 4 and 1 Wm. 4, c. 65.

Of application of interest for maintenance of infants under 11 Geo. 4, and 1 Wm. 4, c. 65.

The 32nd section applies to the subject of the present chapter,

(g) 1 Cr. & Ph. 317.

Application of
interest for
maintenance
under 11 Geo. 4,
and 1 Wm. 4,
c. 65.

and enacts, that it shall be lawful for the Court of Chancery, by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, or any sum of money by virtue of any act for paying off any stock, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said Court, to direct all or any part of the dividends due or to become due, in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person, according to the discretion of such Court, for the maintenance and education, or otherwise for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made, being named in the order directing such payment; and the receipt of such guardian or other person for such dividends or sum of money, or any part thereof, shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same.

It has been decided, that under this section the Court of Chancery has jurisdiction to direct the dividends of stock belonging to an infant to be paid to the *father* for its maintenance.

In *re Naish* (*h*), a small sum of stock bequeathed to an infant, was standing in the names of the infant and a trustee who was dead. After the death of the trustee the father presented his petition under the above act, praying that the dividends might be paid to him for the maintenance of the infant. Sir *L. Shadwell*, V. C., expressed some doubt whether the act authorized the Court to make the order, unless a guardian were previously appointed, observing as to that there would be a difficulty, the father being alive. His Honor thought it a question whether the section applied to the case before him, but on a subsequent day made the order as prayed; a decision certainly in conformity with the spirit and intention of the section, if not strictly within its letter.

SECT. IX. From what time interest on legacies allowed as maintenance.

From what
time maintenance
allowed.

With respect to the time from which maintenance will be allowed, the practice of the Court of Chancery appears to have fluctuated. In *Hughes v. Hughes*, we have seen that Lord *Thurlow* ordered maintenance from the time of the report. In *Andrews v. Partington*, from his judgment, as stated in 2 *Cox's*

(*h*) 9 Law Journ. Rep. (Eq.), 252, N. S.

Ch. Ca. 223, his Lordship held the same opinion; observing, that it was a very proper rule of the Court never to make a father any allowance with retrospect to what he has paid, without the authority of the Court. The cases of *Fendall v. Nash*, and *Billingsley v. Critchet*, before stated, are however instances of a different course adopted by the Court previously to Lord *Thurlow's* decisions. His Lordship seems to have altered his opinion subsequently (i): and, by degrees, as appears from several of the preceding cases, the rule was varied, and it is now settled, that each case must be governed by its own peculiar circumstances; and that the Court will exercise its discretion, so as to meet the exigencies of the case before it, unfettered by any strict technical rule. To the case of *Collis v. Blackburn*, before stated (k), we shall add the following, as illustrating the present practice of the Court.

From what
time maintenance
allowed.

In *Sisson v. Shaw* (l), *Thomas Steele* bequeathed 1,000*l.* stock, and the dividends to accrue thereon, to his two great nieces, *Elizabeth Sisson* and *Mary Sisson*, equally, to be transferred and paid to them at twenty-one; but if either or both of his said nieces should die before that age, then the testator bequeathed the share of her or them so dying, to her or their respective daughter or daughters living at her or their respective decease, equally between them; but in case she or they should not have any such daughter living at her or their decease, then to her or their son or sons who should be living at her or their decease; and in case either of his said nieces should die without leaving any child living at her death, then her share was to survive to the surviving niece and her issue as her original share: and the testator directed his executors, during the minorities of the respective legatees, to apply the dividends, or a competent part thereof, towards the maintenance, education, and support of his said legatees respectively, during their respective minorities; and the surplus, if any, was to accumulate for the benefit of the respective legatees, until they should become entitled to their respective shares; and the testator also gave his executors a power of advancement for the benefit of the legatees. *Elizabeth Sisson* survived the testator but died under twenty-one, in June, 1788. She and her sister were maintained by the executors from the time of the testator's death in 1788 (m). Upon the bill filed by the surviving great

(i) 3 Ves. 733.

(k) *Supra*, 1284.

(l) 9 Ves. 285.

(m) *Newman v. Bateson*, 3 Swan. App. 689, *supra*, 1267; *Dowling v. Tyrell*, 2 Rus. & M. 343.

From what
time maintenance
allowed.

niece, two questions arose; the first, whether each took a vested interest in a moiety of the dividends, &c. the defendant *Thomas Sisson*, as residuary legatee of the father, and administrator of *Elizabeth*, claiming, upon that ground, a moiety of the dividends accrued in his life, against the claim of the plaintiff, as the survivor: and secondly, which more immediately concerns the subject under discussion, whether the executors were entitled to be reimbursed the sums expended for maintenance and education. With respect to the latter question, *Andrews v. Partington*, being cited, Sir *William Grant*, M. R., observed, "That case has been very much shaken: I have found two decrees by Lord *Alvanley*, allowing maintenance for the time past" (m). With respect to the first point, his Honor, upon the express language of the will, decided that it amounted to a plain direction, that the interest should go with the principal, except that part which the executors should have applied in maintenance; and, upon a subsequent day, he remarked, that *in the case before him*, it made no difference, whether the bequest was of a residue or a money legacy.

In the case of *Ex parte Penleaze* (n), the petition on behalf of the infant stated, that under the will of *E. B.* he was entitled to several freehold and copyhold estates of considerable annual value, the rents and profits of which were, by the testatrix's will, directed to be received by *P. S.* and *W. J.*, the trustees, who were expressly required by the said will to lay out the same, after all deductions for repairs, or so much as should be sufficient for that purpose, in the maintenance, support, education, and bringing up of the petitioner: that the amount of the petitioner's then income from his estate and property was 730*l. per annum*; that in the event of his surviving his mother, (aged fifty-three), he would become entitled under the same will to other estates of 800*l. per annum*. That the petitioner's mother derived an income under the same will for her separate use, independently of the petitioner's father, of about 2,000*l. per annum*, which on her death did not go to the father, but was limited to other persons. That the petitioner had a brother wholly unprovided for; and that as, upon the death of the mother, the estates and property to which she was entitled for her life would not devolve to the petitioner's father, he, the father, refused to make the

(m) See *Mundy v. Earl Howe*, *Hoste v. Pratt*, and *Greenwell v. Greenwell*, *supra*, pp. 1297, 1294, 1283.

(n) 1 Bro. C. C., *Bell's* ed. p. 387, note.

petitioner any allowance for his support, education and advancement, and, more especially, as he had sent the petitioner at a considerable expense to the university of *Aberdeen*. That the petitioner was entered as a student at *Lincoln's Inn*, for the purpose of being called to the Bar, and was also entered as a gentleman commoner of *Oxford*; and that he was above the age of nineteen years. That, by the refusal of the trustees, &c., and his father, the petitioner was prevented keeping his terms and prosecuting his studies with effect. The petitioner, therefore, prayed for a reference as to what was proper to be allowed for his maintenance and education, *since the death of his sister (when he became entitled to the estates)*, and for the time to come, for his advancement in life, according to his age and fortune; and that such allowance might be paid by the trustees out of the rents and profits of the estates, or the savings thereof, to the petitioner's father, to be by him applied accordingly; and Sir *William Grant*, M. R., ordered accordingly. The reference as to the allowance was as prayed "for the time past" from the death of the petitioner's sister, and for the time to come, and for his advancement in life, &c. The Master having made his report accordingly, that report was confirmed on the 17th of *August* following. The sum of 1,616*l.*, thereby reported, was ordered to be paid for the petitioner's maintenance and education *for the time past*, from the death of his sister to the 24th of *July* then last, unto the petitioner's father: and the sum of 400*l.* a year was also ordered to be paid for the petitioner's maintenance and education, to his father, for the time to come, till he attained twenty-one.

From what
time maintenance
allowed.

In the case of *Maberly v. Turton (o)*, *Gilbert Mitchell* bequeathed 8,000*l.* to be invested by trustees in stock, who from time to time were to invest the dividends, to accumulate for the benefit of the children of his niece and her husband, until the principal with the accumulated dividends should be divided and paid to them as after mentioned; with power, with the approbation of the father and mother, or the survivor, and after the death of the survivor, at the discretion of the trustees, to apply the dividends, or part thereof, for maintenance, and to pay the 8,000*l.* and the accumulation unto the children then born, or thereafter to be born, equally, share and share alike; the respective shares to be vested interests in such children at their respective ages of twenty-one, or in the issue of such as should

From what
time maintenance
allowed.

die under that age, with benefit of survivorship. A power was given the trustees to elect a new trustee, with the approbation of the mother. The testator's brother (who was one of the trustees) and the husband of the niece were appointed executors. The testator died in 1792. One of the trustees died in his lifetime, and *John Mitchell*, the surviving trustee, died after the testator, leaving the father of the children his executor; no other trustee had been appointed. The bill was filed on behalf of the infant children, and an application was made for an order upon the father to pay in the money. Lord *Eldon's* judgment is reported as follows: "In the case of *Andrews v. Partington*, Lord *Thurlow* thought it so extremely dangerous that a parent should determine for himself the question, whether he was of ability to maintain his children, that he would not allow Mr. *Partington* one shilling of the money which he had permitted to be expended in the time past. The decision was according to precedents; but there is no doubt, that since that time the rule has been altered. At present, as the precedents stand, the Court must look at each case, with the view to make such order as the rule prescribed by the testator justifies, and the conduct of the parties allows. In this case, there is no doubt the intention of the testator was not to entrust this father and mother with the power of applying these dividends to maintenance. The intention was, that if it should be proper this interest, directed to accumulate, should be applied in maintenance, the trustees should have the power to make that application: but that is to be checked by the approbation of the father and mother. The result is, that if they had, for good and substantial reasons, approved the application of the dividends towards maintenance, and the trustees, without a solid reason, had refused to act upon that, the Court would, if an application had been made in seasonable time, examine whether the trustees ought to act upon it. But in this instance there were no trustees; at least, none who had been acting; and if the interest has been applied, that application has been, not according to the discretion of those persons whom the testator intended and authorized to act, but according to the approbation of the father and mother, not checked by the discretion of the trustees; and then the fact that there were no trustees, or that the trustees never acted, which is in effect the same, imposes upon the Court the necessity of examining strictly what trustees ought to have done. Therefore I shall direct a reference to the Master to inquire whether it would have been reasonable and proper for any trustee or trustees,

acting in the execution of this will, to apply any and what part of the interest and dividends of the sum of 8,000*l.* in or towards the maintenance of the children, and in what proportions, as between such children respectively; and to state what children there were at the date of the will, and at the death of the testator; what children have been born since, and which of them are now living: the Master to have regard to the situation, circumstances, and ability of the father, and the fortunes of his children. I desire it to be understood, I do this upon the particular circumstances of this will." The Master's report under this order stated, that at the death of the testator there were five children; one of whom was dead, and two more had been since born; and that it was reasonable to apply the whole of the interest and dividends of the 8,000*l.* for maintenance.

Where a fund is given upon a contingency, and intermediate interest undisposed of.

In *Ex parte Bond* (*p*), Sir C. Pepys, M. R., said, he had on several recent occasions made inquiry as to the practice, and found it was contrary to that stated to have been introduced by Lord Rosshyn. To allow for past maintenance, and to treat as a debt the expenditure which the law imposed upon the father as a duty, would be to act against the settled rule of the Court. The Court might, if a special case were made, direct an inquiry; but there the inquiry as to past maintenance was asked for as a matter of course, and must consequently be refused.

In *Pickwick v. Gibbes* (*q*), the testator directed the investment of a sum of money as soon as conveniently could be after his wife's decease, and the income, or a competent part of it, to be applied for the benefit of an infant nephew: the wife died in the testatrix's lifetime, and Lord Langdale, M. R., held, that interest was to be computed from *the testator's death*; the intention was, that the legatee was to have maintenance from the wife's death; and the wife having pre-deceased the testator, interest for the legatee's maintenance became payable from the testator's death.

SECT. X. Of interest, where a particular or residuary fund is given upon a contingency, so that the intermediate interest is undisposed of.

Where a fund, whether particular or residuary, is given upon a contingency, so that the intermediate interest is undisposed of (that is to say), the intermediate interest between the testator's

(*p*) 2 Myl. & K. 439; see also *Simon v. Barber*, Taml. 22.

(*q*) 1 Beav. 271.

Where a fund
is given upon a
contingency,
and interme-
diate interest
undisposed of.

death, if there be no previous legatee for life, or, if there be, then between the death of such previous taker and the happening of the contingency, will sink into the residue for the benefit of the executor (*q*) or next of kin of the testator, if not bequeathed by him; but if disposed of, for the benefit of his residuary legatee. For example, where there is a previous life estate, as to *A.*, and after his death to the youngest child of *B.*, and *A.* dies in *B.*'s lifetime; as it is uncertain, during the life of *B.*, which of his children may be the youngest at the period of his death, the legacy cannot vest upon the death of *A.*; so that the interest to accrue between the deaths of *A.* and *B.* is, upon the event that has happened, undisposed of, and will fall into the residue for the benefit of the persons ultimately entitled thereto.

So again, if the legacy were given to *A.* for life, and five years after *A.*'s death to *B.*, the intermediate interest of the legacy between *A.*'s death and the end of the five years would, as undisposed of, sink into the residue.

The law is the same, if there be not a previous life estate, as where a legacy is given to *A.* upon the contingency of his attaining twenty-one; or to *A.* upon the death of *B.*; or five years after the testator's death. In all these cases the intermediate interest between the testator's death and the happening of the contingency or future event will sink into the residue, the legatees attaining the age or living to the prescribed period, being of the essence of the gift, they cannot vest before; and accordingly the interest is undisposed of in the interim.

1. Where a
previous life
estate.

1. *First*, where the legacy is given to one for life, and after his death over to another upon a contingency.

In the case of *Wyndham v. Wyndham* (*r*), *Wadham Wyndham*, by will, in 1763, directed his trustees, *H. W. Wyndham* and *P. Wyndham* (the plaintiff), to settle an account of what he had in the public funds, bonds, mortgages, or securities; and after paying his wife *Catherine* what was due to her under her marriage articles, to vest the remainder in the public funds, and pay the interest to his wife for life; and, after her decease, to her niece, *Lady Cope*, for life; and if she died without leaving children, then he left the principal to the *younger children* of his nephew, the said *H. W. Wyndham*, if he should have any; if not, then he left it to his cousin, the defendant *Wadham Wyndham*. The testator bequeathed the residue of his estate to his wife. After

(*q*) Not within 1 Wm. 4, c. 4, see Ch. xxiv. *infra*. (*r*) 3 Bro. C. C. 57.

the testator's death, the trustees paid the wife what was due to her under the settlement, and invested the surplus in the funds, and paid the dividends to the wife during her life; and after her death to Lady Cope for life, who died without children. *H. W. Wyndham* being then unmarried, the principal of the trust funds vested in *Wadham Wyndham*, subject to the contingency in favour of the younger children of *H. W. Wyndham*, if he should have any; he afterwards died in 1784, without children. A doubt having arisen, whether the interest of the funds, between the deaths of Lady Cope and *H. W. Wyndham*, belonged to *Wadham Wyndham*, or fell into the residue as undisposed of, a bill was filed by the surviving trustees to have the opinion of the Court on the question, which was solely between the defendants *Wadham Wyndham* and *Huntley* the executor of the testator's widow. Lord *Thurlow*, C., thought it surprising, that there was no case in which this question had occurred; but said, "where interest, till an event arrived was not disposed of, it must fall into the residue: as, suppose the testator gave a bond to a particular person, not to vest in him till a given time, the intermediate interest must vest in the executor; and if the residue were given in the same way, the interest would also go to the executor. An account must be taken of the intermediate interest as a part of the testator's general personal estate."

Where a fund is given upon a contingency, and intermediate interest undisposed of.

Where a previous life. interest.

Again, in *Shawe v. Cunliffe* (s), Sir *Ellis Cunliffe* directed his executors to lay out 1,000*l.* and (in an event which happened, namely, the testator having no son), the further sum of 4,000*l.* at interest; and to pay the interest to his brother *W. Shawe*, and *Ann* his wife, during their respective lives: and after the death of the survivor, to call in and pay the principal to all their daughters and younger sons, living at the decease of such survivor, equally; and if there should be but one such daughter or younger son then living, then to him or her. The testator also, directed his executors to lay out the further sum of 1,000*l.*, and (in the event before mentioned) the further sum of 4,000*l.* at interest, and pay the interest to his sister *Mary Cunliffe*, spinster, for life; and after her death to call in and pay the principal unto all her daughters and younger sons, living at her death, equally; and if but one, then to such one daughter or younger son: and if his said sister should have no such daughter or younger son living at the time of her decease, then to his said brother and sister *Shawe's* daughters and younger sons, in the same manner as the first mentioned legacy: and in case any such daughters or younger sons

Where a fund is given upon a contingency, and intermediate interest undisposed of.

Where a previous life-interest.

of his brother and sister *Shawe*, or his sister *Cunliffe*, should, at the death of their respective parents, be under twenty-one, and such daughters should be then unmarried, their shares should be paid to their guardians, whose receipts should be discharges: and in case his brother and sister *Shawe* should die without having any daughter or younger son, living at the decease of the survivor, then the said legacies should sink into the residue, which he gave to his executors in trust for his eldest or only son: and the testator gave the residue, in case he left no son, to Sir *Robert Cunliffe*, whom, with other persons, he appointed executor. The testator died in 1767, leaving a widow and two daughters. Questions having arisen on the will, Sir *Robert Cunliffe* filed his bill. The several legacies of 1,000*l.* and 4,000*l.* were ordered to be paid into the Bank in the three *per cents.*; the interest of one set of the legacies of 1,000*l.* and 4,000*l.* to be paid to *Shawe* and wife for their lives; and the interest of the other to *Mary Cunliffe* for life, with liberty at their deaths for the other parties, &c. to apply. Sir *Robert Cunliffe* afterwards died, and appointed Sir *Foster Cunliffe* and others his executors. In 1785, *Mary Cunliffe* died *unmarried and without issue*: in 1791, *Ann Shawe*, having survived her husband, died, leaving at her death *Joseph Shawe* her only younger son, and *Mary Walmsley* and *M. H. Whitehead*, her only younger daughters, living at her death. The question was made on the part of *Ann Shawe*'s younger son and daughters, whether they, who now became entitled to *Mary Cunliffe*'s 1,000*l.* and 4,000*l.*, were not also entitled to the intermediate interest, which had accrued between the death of *Mary Cunliffe*, in 1785, and that of *Ann Shawe*, in 1793. On the other hand, Sir *Foster Cunliffe* and the other executors of Sir *Robert Cunliffe*, the residuary legatee of Sir *Ellis Cunliffe*, contended that such intermediate interest was undisposed of, and fell into the residue. The Lords Commissioners *Eyre*, *Ashurst*, and *Wilson*, decided, that the intermediate interest sunk into the residue. *Eyre*, Lord Commissioner, thought, upon the construction of the whole will, the testator shewed an intention to provide only for those children of Mr. and Mrs. *Shawe*, who should survive both their parents. With respect to the question of interest, he considered it determined by *Wyndham v. Wyndham*; and stated the rule thus: "if there be a fund, whether residuary or particular, given to *A.* for life, and afterwards, upon a contingency which does not take effect upon the death of the tenant for life, the intermediate interest is an interest undisposed of, and, therefore, falls into the residue; this is the technical rule decidedly

established by that authority, and must be conclusive; and no settled distinction between a general residue, or a particular part of a residue severed for the purpose of being a productive fund, so as to create an effectual interest to the tenant for life has prevailed." *Ashurst*, Lord Commissioner, observed, it would have prevented litigation, if, in all cases, whether of a vested or contingent fund, where the interest had been undisposed of, it had been decided to fall into the residue, where there is a residuary clause; but, as to a contingent gift, it had been uniformly so held. *Wilson*, Lord Commissioner, remarked, that the interest was not to be given to the children as it arose, nor could it accumulate, but must sink into the residue.

Where a fund is given upon a contingency, and intermediate interest undisposed of.

Where no previous life-interest.

2. *Secondly*, Where there is not any previous life-interest. We have already (*t*) shewn, with respect to contingent legacies, as well particular, as residuary, that interest is not due to the legatee until the time of *payment* arrives. We have now to observe, that such intermediate interest between the testator's death and the happening of the contingency sinks into the residue, but with this difference arising from the different nature of the gifts (namely), that the interest upon the contingent *residuary* bequest goes of course with the *capital*; but the interest of the *particular* contingent legacy does *not*, but as undisposed of, forms part of the *corpus* of the residue for the benefit of the residuary legatee, or such as are ultimately entitled thereto (*u*).

2. Where no previous life-interest.

In regard to a contingent *general* legacy, as distinguished from a *residuary* bequest, the case of *Haughton v. Harrison* before (*v*) stated, is an instance, wherein the interest of the 500*l.* given to the younger children of *Mary Price* arriving at the age of twenty-one, was decreed to belong to the residuary legatee, until the children attained twenty-one. The reader is also referred to the cases cited below (*w*), and stated in a former chapter as instances of contingent general legacies, similar to the one just mentioned, and in which the intermediate interest would sink into the residue.

With respect to the case of a *residue* given upon a contingent

(*t*) *Supra*, Sect. v. p. 1272.

(*u*) 2 Mer. 384; *Leake v. Robinson*; see also *Harris v. Lloyd*, 1 Tur. & Russ. 310.

(*v*) 2 Atk. 329, stated *supra*, Sect. v. p. 1274.

(*w*) *Smell v. Des*; *Onslow v. South*; *Cruse v. Barley*; *Atkinson v. Turner*; *Elton v. Elton*; *Knight v. Cameron*; *Stapleton v. Cheales*, and *Hanson v. Graham*, cited Chap. X. Sect. III., p. 566 to 571.

Where a fund is given upon a contingency, and intermediate interest undisposed of.

Where no previous life-interest.

future event, in such a manner as not to entitle the residuary legatee to the intermediate interest, accruing between the testator's death, and the time appointed for payment of the residuary funds; such interest will fall into the residue, to accumulate for the benefit of the residuary legatee, or for the executors or next of kin of the testator, upon the event of the residuary legatee's death before the legacy vests in him; or for such other person as may, on that contingency, be named to take it (x).

Thus, in *Bullock v. Stones* (y), *John Stones* bequeathed all his personal estate to trustees, after payment of debts, &c. in trust for the first son of *John Stones* (the testator's heir-at-law) when he attained twenty-one. *John Stones* (the heir-at-law) had no son living at the testator's death; and Lord *Hardwicke* declared that the interests and profits of the residuary personal estate, from the death of the testator to the time *John Stones* should have a son attaining twenty-one, should fall into the residue and accumulate for that son, and be paid to him at the time he would be entitled to receive the capital.

So, in *Studholme v. Hodgson* (z), *Michael Studholme* bequeathed exchequer annuities to *Michael Hodgson*, the son of the defendant *Cuthbert Hodgson* (his nephew), and *Mary* his wife, with directions that the proceeds should be laid out at interest, and out of the interest that *Michael Hodgson* should be maintained, &c. till twenty-one; at which time all the proceeds and profits thereof, and the principal money so placed out, and interest were to be paid to *Michael Hodgson*; but if he died before twenty-one, then the testator bequeathed the annuities, &c. given to *Michael* to his mother *Mary*, and to such other child or children as she might have equally; and for want thereof to her executors, &c. The testator also gave certain leaseholds to *Mary Proctor*, one of the defendants for life, and after her decease to *Michael Hodgson*, if he lived to twenty-one, otherwise to the other children of *Mary Hodgson*, and for want of such to *Mary Hodgson*, her executors, &c.: and after other specific bequests, the testator gave the residue of his real and personal estate to *Michael Hodgson*, and appointed *Mary Proctor* executrix. By codicil, the testator, after reciting the bequests (particular as well as residuary) to *Michael Hodgson*, declared that in case *Michael Hodgson* should die before twenty-one, and the said *Mary*, his

(x) Forr. 145; 1 Ves. s. 485; *Butler v. Freeman*, *supra*, p. 1275; 3 Atk. 58.

(y) 2 Ves. s. 521; see *Duffield v. Duffield*, 1 Dow. & Cl. 268.

(z) 3 P. Wms. 299.

mother, should die without any other child by the said *Cuthbert Hodgson*, then all the legacies and bequests should go to his nephew *William Studholme* (the plaintiff), his heirs and assigns for ever. The infant, *Michael Hodgson*, survived the testator, but died within a few days before his age of twenty-one years, *Mary* his mother being forty, and her husband forty-five, and having no other child. Upon the bill of the plaintiff *Studholme* (the devisee over) for an account, and to have the property secured, a question arose, whether he was entitled to the interest which should accrue between the death of *Michael* and the decease of *Mary* without any other child by her then present husband. It was insisted that the same belonged to the mother by necessary implication, and it was compared to a devise of freehold to the testator's heir-at-law after the death of *J. S.*, in which case *J. S.* would have it sooner, and in the meantime be entitled to the premises for his life (a). But Lord *Talbot* said, that in the case cited the testator had declared his intention that the heir-at-law should not have it sooner, and there the freehold could not be kept in abeyance, but must vest in somebody; whereas, in the present case, there is no such rule with regard to personal estates, which may remain in suspense; wherefore the profits of the residue from the death of *Michael* till the contingency happens, are to *accumulate* and be added to the capital; and if no child of the defendant *Mary* by her husband *Cuthbert*, then to go to the plaintiff.

Where a fund is given upon a contingency, and intermediate interest undisposed of.

Where no previous life-interest.

So in *Green v. Ekins* (b), *Green*, the testator, having by his first wife one daughter, named *Elizabeth*, (the wife of the defendant, *Barnaby*), and by his second wife, another daughter, named *Frances*, (an infant at the death of the testator), bequeathed several particular legacies to his wife and his two daughters; and after directing that his trade should be carried on for the benefit of those who should be entitled to the residue of his estate, bequeathed the residue of his personal estate to any son he should have by his wife at twenty-one; and if no son, then to his daughter, *Frances*, to be paid at twenty-one, or marriage; but if she died before, and he should have no other daughter by his second wife who should attain twenty-one or be married, then if his daughter, *Elizabeth*, should have any issue of her body one or more son or sons, he gave the residue of his personal estate to such son as should first attain twenty-one; but if his

(a) *Gardiner v. Sheldon*, Vaugh. 259.

(b) 2 Atk. 472.

Where a fund is given upon a contingency, and intermediate interest undisposed of.

Where no previous life-interest.

daughter should have no such son, or having such, none should attain twenty-one, then he gave the residue to *W. E. Pier*, (a defendant), subject to the payment of 4,000*l.* to the daughter of his daughter, *Barnaby*, as therein mentioned. *Frances* died an infant within a few months after the testator's death, and the plaintiff, the eldest son of *Elizabeth*, being entitled when of age to the residue, filed his bill: and the question was, whether the interest of the residue of the personal estate, from the death of *Frances*, the daughter, to the time it would vest in the plaintiff or any other son of *Elizabeth*, must be accumulated and wait the contingency; or whether, as the defendants contended, it was an interest undisposed of, and went to the next of kin of the testator. Lord *Hardwicke* decided that it was part of the residue, observing, "During the life of *Frances*, the daughter, the profits vested in her, because the residue did so; as it was a legacy payable at a future time, and divested on the contingency, and she being a daughter, and this her portion, he decreed them to her representatives. As to the rest of the profits, which have accrued and will accrue till the devise to the son of Mr. *Barnaby* vests, I am of opinion that the interest and profits must be considered as a part of the residue, and must accumulate." His Lordship further remarked, that the residue of a personal estate was nothing fixed, but a fluctuating interest, and if the personal estate were increased by any event after the death of the testator, it was part of the residue, and would pass as such; and why then not the interest of the residue; for that interest was assets, and part of the estate.

In *Trevanion v. Vivian* (c), a bequest was made of the residue of personal estate, if the legatee should attain twenty-one. That the profits in the meantime were given and should accumulate, were cited two cases, *Green v. Ekins* last stated, and *Butler v. Butler*, 22nd of June, 1744, where a residue was devised to *A.* if he should attain twenty-one, but if not, then over; but Lord *Hardwicke*, C., would not suffer it to be argued, as having determined it before, that the interest should accumulate and make part of the residue; so in this case, interest made part of the residue, not like an executory devise of land, which plainly descended to the heir-at-law in the meantime.

(c) 2 Ves. sen. 430.

SECT. XI. Of interest, where a particular or residuary fund is given by immediate bequest, with a condition to divest it upon a contingency with a limitation over to another.

Where a fund is given by immediate bequest, with a condition divesting it in favour of a legatee over.

Where a legacy is given by *immediate* bequest, whether such legacy be *particular* or *residuary*, and there is a condition to divest it upon the death of the legatee under twenty-one, or upon the happening of some other event, with a limitation over, and the legatee dies before twenty-one, or before such other event happens, which nevertheless does take place; yet, as the legacy was payable at the end of the year after the testator's death, the legatee's representative, and not the legatee over will be entitled to the interest which accrued during the legatee's life, until the happening of the event which was to divest the legacy.

Thus, in *Tissen v. Tissen* (d), *Francis Tissen* bequeathed all his personal estate and the produce thereof, after the payment of debts, &c., to the child his wife was then *enceinte* with; if one son, then to such son, and if more than one son, and the first son should die before twenty-one, or marriage, without issue, then his personal estate should go in succession to the sons of his body; but in case there should be no such son, or all such sons should die before twenty-one, or marriage, without issue, then he gave it to his executors and administrators, and appointed his three brothers, *John, William, and Samuel*, executors. The widow was afterwards delivered of a son, the plaintiff *Francis*, the infant, who filed the bill for an account, and to have directions concerning his father's estate. The cause having been heard before Sir *Joseph Jekyll*, M. R., he decreed that no more than the principal money of the testator's personal estate should go over to his three younger brothers, in case the plaintiff should die under age and unmarried, without issue; and declared that the interest, which should be made of the principal, belonged in all events to the plaintiff, and should be placed out from time to time for his benefit. Upon an appeal from this decree to Lord Chancellor *Parker*, it was objected, that in case of the plaintiff's death under age, unmarried, and without issue, not only the principal, but also such profits as should be made thereof, should go by the will to the appellants, *John, William, and Samuel*, the executors; for the design was to amass an estate together; and

Where fund is given by immediate bequest, with a condition divesting it in favour of a legatee over.

when he gave his personal estate with the produce of it to the son that his wife was *enceinte* with, and if no son, or if that son should die under twenty-one, or before marriage, and without issue, then to his executors; the word *it* comprehended the whole legacy given to his son, and imported as well the whole produce of the personal estate, as the personal estate itself. But his Lordship said, "The son shall have the profits to himself, but the personal estate, that is, the whole capital stock, shall go over in case of the son's death unmarried, without issue, and under twenty-one."

Again, in *Taylor v. Johnson* (e), a testator bequeathed 500*l.* to his infant grandson, without mentioning any time of payment, with a proviso, that if the grandson should die before twenty-one, the legacy was to go to another person. The question was, whether the grandson should have the interest of the 500*l.* during infancy; and Sir *Joseph Jekyll*, M. R., said, "It is extremely clear that this is a condition subsequent, and therefore, as the infant's death before twenty-one will only defeat the legacy from the time it happens, consequently, in the meanwhile, it shall carry interest, at least from the end of a year after the death of the testator."

In *Shepherd v. Ingram* (f), the testator, *Shepherd*, having devised all his real estates, and also his personal estate to trustees for certain purposes, declared that, as to the residue thereof, he gave the same to the child or children of his daughter *Frances*, in equal shares, but in case she died without leaving issue, then to *Christopher Jeafferson* and *Joseph Pyke*. After the testator's death, *Frances* married, and, having three children, a suit was instituted on their behalf for an account of the profits of the residue of the real and personal estate from the birth of the eldest child; and that so much as became due, from that period until the birth of the second, might be declared to belong to the first; and so much as accrued after the birth of the second, to the time the third was born, might be declared to belong to the first and second children; and that so much as became due from the birth of the third child might be declared to be the property of all the three children; and it was so decreed by Lord *Northington*, C., his Lordship being clearly of opinion, that the children took a defeasible interest in the residue, and put the case of a legal devise of the residue to the children, with a subsequent clause declaring, that if all

(e) 2 P. Wms. 504.

(f) Ambl. 448.

the children died in the life of their mother, then the residue should go over; "That," said his Lordship, "would be an absolute devise with a defeasible clause, and the children would be clearly entitled to the interest and profits until the contingency happened."

Where a fund is given by immediate bequest, with a condition divesting it in favour of a legatee over.

In *Mills v. Norris* (g) *Andrew Moffatt* bequeathed his residuary estate and the interest thereof to the children of his two daughters, *Elizabeth Mills* and *Martha Norris*, to be paid at twenty-one, with a declaration that the issue of a deceased child should be entitled to its parent's share; but if his daughters happened to die without issue, or, having issue, such issue should die without issue during the lives of *Elizabeth Mills* and *Martha Norris*, then he gave his residuary estate to his brothers *James* and *Aaron Moffatt*. Two children of the testator's daughters having attained twenty-one, an order of the Court of Chancery was obtained for payment of interest to such of the children who had attained that age, upon their respective shares. Another child being shortly afterwards born, a question arose, whether it was entitled to a proportion of the interest, which accrued prior to its birth, and the Court determined that it was not entitled to any part of the by-gone interest, but to a share of the capital only.

In *Montgomerie v. Woodley* (h), *Crisp Molineux*, after bequeathing his residuary personal estate to his second grandson, *W. C. M. Montgomerie* for life, and after his death, to his first and other sons, and the heirs male of their bodies, with similar limitations in favour of his third and other grandsons, and their issue, such limitations exactly corresponding with those which the testator had made before of his real estate, directed that none of his grandsons should take or come into possession of any of his estates before they attained their ages of twenty-five, but that they should receive maintenances during minority, and also from their ages of twenty-one to twenty-five. The testator died in 1792; and *W. C. M. Montgomerie*, in 1797, an infant, and without issue. The father of *W. C. M. Montgomerie* administered to him, and claimed, amongst other things, the interest of the residuary personal estate, which accrued between the deaths of the testator and *W. C. M. Montgomerie*: and the Court of Chancery decreed in favour of such claim, upon the

(g) 5 Ves. 335; see also *Scott v. Earl of Scarborough*, 1 Beav. 154; *Brandon v. Aston*, 2 Yo. & Coll. (C.), 30.

(h) 5 Ves. 522, and see *Barber v. Barber*, 3 Myl. & Cr. 688.

Where a fund is given by immediate bequest, with a condition divesting it in favour of a legatee over.

ground, that the bequest to the grandson was immediate, and vested in him for life, and was not divested nor revoked by the subsequent clause, the only effect whereof was to postpone the actual possession, until the grandsons attained their ages of twenty-five.

SECT. XII. Of interest, where a *residue* is given so as to be vested immediately, but payable upon a future contingent event, either with or without a condition divesting it in favor of a legatee over.

Where a residue is given, so as to be vested, but payable upon a future contingency, with a condition divesting it.

The Court of Chancery has gone one step further in the case of *residuary dispositions*, and determined that if a *residue* is given, so as to be vested, but *not payable*, at the end of the year from the testator's death, but upon the legatee's attaining twenty-one, or upon any other contingency, and with a bequest over divesting the legacy, upon the legatee's dying under that age, or upon the happening of the contingency, then the legatee's representative in the former case, and the legatee himself in the latter, shall be entitled to the interest that became due during the legatee's life, or until the happening of the contingency.

In *Nicholls v. Osborn* (i), Mrs. *Powell* bequeathed the surplus of her personal estate, which was about 3,000*l.*, to her niece, (being an infant of about seventeen), *to be paid* at twenty-one, and if she died before twenty-one, or marriage, then she bequeathed it over. Upon the death of the testatrix, one of the questions was, who should have the produce and interest of the surplus during the infancy of the niece. Sir *Joseph Jekyll*, M. R., decreed, that the infant niece was entitled to the profits, and the interest of the surplus which should accrue from the death of the testatrix, and in the life of the niece, though she should happen to die before attaining twenty-one.

So, in *Chaworth v. Hooper* (j), a residue was bequeathed to an infant, *payable* at twenty-one, with a bequest over in case of her dying under that age. The question was, whether, as the infant died under that age, the interest, from the death of the testator to that of the infant, should go to the representative, or to the remainder man. Baron *Eyre* said, "he could not distinguish this case from that of *Nicholls v. Osborne* (k). The whole residue is here given to the infant; what is to become of the produce? Where the use would be, if it was a specific thing, or

(i) 2 P. Wms. 419.

(j) 1 Bro. C. C. 81.

(k) *Ubi sup.*

the rents, if it was land. The interest is the natural produce. It is not a charge upon any body. The produce must go to the person, who has the thing liable to be divested: when divested, it must from that moment go to the person who comes in."

Where a residue is given, so as to be vested, but payable upon a future contingency, with a condition divesting it.

In *Hawkins v. Combe* (1), *Thomas Strode* bequeathed the residue of his personal estate to trustees, to pay the legacies given by his will, and, after payment thereof, as to two-third parts thereof, for the benefit of two of his nieces, in the manner therein mentioned, and as to the other third part, in trust to invest it in securities; and during the joint lives of his niece *Grace*, and of *W. Hawkins* her husband, or until some one of the children of his said niece should attain twenty-one, to lay out the interest in like manner, to accumulate for the benefit of the issue of his said niece, or such other persons as were thereafter mentioned: it being his intent that his said niece during the life of her husband, or her said husband should not receive or be benefited by any part of his estate; and in case she survived him, and should have issue by him or any future husband under twenty-one, he then directed that the trustees should pay the interest, &c. to her, or to some other person, for the maintenance and education of such children, until they should attain their respective ages of twenty-one; and, upon their respectively attaining that age, upon trust to pay and transfer the funds, and all arrears to all the children in equal shares; and if there should be one child only, to that one child at twenty-one: and in case his said niece should survive her said husband, and have no issue then living by him, or, having such issue, they should die under twenty-one, then to pay the interest to *Grace Hawkins* for life, with remainders over, and he made the trustees executors. The plaintiff *Thomas*, the son of *William* and *Grace Hawkins*, attained his age of twenty-one, in 1775, and *Martha Hawkins*, their other child, attained that age in 1782. A bill was filed by *Thomas* and *Martha Hawkins*, against the defendant *Combe*, executor of the surviving executor of the will of *Thomas Strode*, and against *William Hawkins* and *Grace* his wife, for the interest made of the third part of the residue, bequeathed as above, since the plaintiff *Thomas* attained his age of twenty-one; and the only question was, whether the interest vested in such children as should be living, when the eldest attained his age of twenty-one. The Lords Commissioners *Ashurst* and *Hotham*, determined that the accumulation ceased when *Thomas*, one of the children,

Where a residue is given, so as to be vested, but payable upon a future contingency, with a condition divesting it.

attained twenty-one; and that from that time the interest belonged to the plaintiffs in equal moieties.

The doctrine of the preceding cases is confirmed by the judgment in *Skey v. Barnes* (m). In that case, the testator bequeathed all his personal estate upon trust (subject to the life interest of his daughter, and to her appointment by will, among her children) for all and every the children of his daughter, the shares of sons to be paid at twenty-one, and of daughters at that age or marriage, which should first happen; but in case there should be no such issue of his daughter, or, being such, all such issue should die without issue before his, her or their respective portions should become payable as aforesaid; then for the testator's sister, niece and nephew, as therein mentioned; with power for the trustees to apply the interest of the children's portions towards their maintenance and education, until their respective portions became payable. The testator's daughter survived him, and afterwards died without making any appointment, leaving *James Skey* (her husband), the plaintiff (her son), the defendant, *Mary Skey*, and *Frances, Sarah, and Elizabeth Skey* (her daughters) surviving. *Elizabeth* died in *January*, 1811, under twenty-one, unmarried, and intestate; *Sarah* attained twenty-one, but died in *October*, 1811, having by her will appointed the defendants, *George Skey* and *Mary* her sister, executor and executrix. *Frances* also attained twenty-one, but died in 1813, intestate, and unmarried. Administration to *Elizabeth* and *Frances*, was taken out by their father, *James Skey*, the defendant. The question was, as to the share of *Elizabeth*, who had died under twenty-one, and unmarried, to which the plaintiff claimed to be entitled, together with the defendant *Mary*, and the representatives of *Sarah* and *Frances*, by right of survivorship. The defendant, *James Skey* (the father), on the contrary, insisted that the share of *Elizabeth* was a vested interest, transmissible to her personal representatives, and he claimed to be entitled to it as her administrator. Sir *William Grant*, M. R., decided that the shares having vested from the beginning, and the contingency, on which they were to be divested, not having happened, the father, as representative of the deceased child, was entitled to her share. In the course of an able judgment, his Honor observed, "The directing payment to be made at twenty-one, does not postpone vesting, even in the case of a common legacy, still less in the case of a *residue*. There is indeed a clause

(m) 3 Meriv. 335.

authorizing the executors to apply the interest and dividends of the children's portions for their education, maintenance, or other benefit or advantage; but there is nothing that can exclude their right to the surplus of income that might not be so employed; nor is there anything that could entitle those, who are to take in the event of all the children's dying without issue, under twenty-one, to claim the surplus interest and produce of the residue during the lives of those children."

Where a residue is given, so as to be vested, but payable upon a future contingency, with a condition divesting it.

In the following case of *Grant v. Grant* (n), there was no condition to divest the legacy in favour of the legatee over. There the testatrix gave the residue of her real and personal estate to her adopted child *Maria Hannay Grant*, and appointed four persons executors and guardians of her adopted child, (adding) "whose property I should wish to be paid into her hands on the day she attains her twenty-fifth year, and not till then, unless she marries; her whole property then to be settled upon her and her children, in the event of her husband's death before her's; but if there are no children, then either the whole, or the largest part of her property, as shall seem best to her guardians, to be at her own free and uncontrolled disposal." The legatee attained twenty-one, and petitioned that the accumulations of so much of the residuary estate as had not been applied to her maintenance, and also the future income of the residuary estate, might be paid to her until the further order of the Court. For the petition it was urged, that as the residue was not given over, in the event of the petitioner dying under twenty-five, she would be entitled to receive the principal immediately, but for the clause contained in the will as to her marriage; that as that clause did not affect the income of the residue, the legatee was entitled to receive *that*, being able to give a legal discharge, and the Court of Exchequer made the order as prayed.

The counsel in support of the petition referred to a manuscript note of *Devisme v. Mellish* (o), in which specific legacies were given absolutely to the testator's daughter; then followed considerable bequests to her upon attaining twenty-five, which latter legacies were given over in the event of her dying before that time; the will contained a general direction that the legatee should not be considered of age to any intents before twenty-five; upon attaining twenty-one, she petitioned for the specific legacies, and Lord *Eldon* thought her entitled to them at that time, as they were not given over, and she clearly at that age might discharge the executors.

(n) 3 Y. & Coll. (E.), 171.

(o) In Ch. July 16, 1808.

Of bequests of
residue for life,
with remainder
over.

SECT. XIII. Of interest where a residue of personalty consisting of a mixed fund, is given to one for life, and after his death to one or more persons in remainder.

Where a residue, consisting of various descriptions of personal property is given to one for life, and after his death to or in trust for one or more persons in remainder, questions arise, first, from what period is the tenant for life entitled to the income of that residue, whether from the testator's death, the end of the year from that period, or from what other period; and, secondly, to what extent is the tenant for life entitled to the income of that residue—is he to take the actual income of the various kinds of property of which it is composed, as they existed at the testator's death *in specie*, or only the income which, if actually invested, the estimated value would produce? In reference to these questions, it is to be observed further, that the residue is sometimes given to trustees to convert and invest it in government stock, or other security, and to pay the net income of the property so invested to one for life with remainder over; sometimes it is given generally, without any direction to convert and invest; sometimes the produce of the residue, when converted, is directed to be laid out in the purchase of land, to be settled on one for life with remainders over; and sometimes these trusts are accompanied with, and at others without, directions for accumulation. Where, however, there is no express direction to convert the residue, there, in the absence of any contrary intention, the tenant for life will not be entitled to the enjoyment of the income of the property *in specie*, where that is not of a permanent nature: for he would thereby be gaining an undue advantage at the expense of the persons in remainder.

Courts of Equity, therefore, having regard to an equitable adjustment of the rights of all parties interested in the residue, have assumed or discovered an intention in testators, equally to confer a benefit upon all the objects of their bounty, to the extent of the interests given. To effectuate this adjustment, they have adopted certain rules in the administration of a mixed residue so given to persons in succession; but these rules have not been well settled, and although later decisions have tended to produce in some measure a greater uniformity in the rules and their application, it cannot be considered, even yet, that they are perfectly settled.

The various points adverted to, and others connected with the subject of this section will be more fully considered, as we discuss under the following arrangement, the interest of a person entitled for life to a residue, consisting of various descriptions of personal estate.

Of bequests of residue for life, with remainder over.

1. *First*, where a residue is given to trustees upon trust to convert and invest it, and pay the net income to one for life with remainder over; there being no trust for accumulation, and the residue at the testator's death consisting of various descriptions of personal property, such as money in the government funds, long annuities, leaseholds, or other property wearing out or placed on precarious security.

2. *Secondly*, Where there is no express direction to convert and invest, and no trust for accumulation.

3. *Thirdly*, Where there is a direction to convert such residue, and invest the produce in the purchase of real estate, to be settled upon one for life with remainders over, and where there is no trust for accumulation of the income until investment in real estate, but there is a direction to invest in government or real security in the meantime, and to apply the income as the rents of the real estate would be applicable when purchased.

4. *Fourthly*, Where there is such a trust to invest in real estate to be so settled, and a trust for the accumulation of the fund until invested in real estate.

5. *Fifthly*. Where there is no trust for conversion, and the property is to be enjoyed *in specie*.

1. We proceed to consider *first* the rights of the tenant for life, where a residue is given to trustees upon trust to convert and invest, and pay the net income to the tenant for life, with remainders over, there being no trust for accumulation.

1. When residue given in trust to convert, &c. and no accumulation directed.

In the prosecution of this subject, it will be necessary to enter into a more detailed consideration of the particular kinds of property which constitute the residue, for it will be found that their different natures regulate the period from which the tenant for life is to enter upon the enjoyment of the income, either actual or assumed to be derived therefrom. At one time it appears to have been thought that the *quasi* tenant for life was not entitled to any part of the residue but from the end of the year from the testator's death; and the cases of *Stott v. Hollingworth* (*p*), which was appealed from and afterwards compromised (*q*), and *Taylor*

(*p*) 3 Mad. 161.

(*q*) 1 Tur. & R. 243.

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v. Hibbert (r), so considered the rule. Those authorities must be considered as overruled, and it appears to be now settled, that the tenant for life is entitled from the death of the testator, to the income of all such parts of the residue as consist of monies in the funds, government or real securities or otherwise, in a state of investment in accordance with the directions of the will, so far of course as such income is not required for the payment of debts and legacies. The tenant for life is also entitled to the income of all such investments as may have been made pursuant to the will during the first year.

These points appear to be clearly settled by the cases of *Hewitt v. Morris* (s), and *La Terriere v. Bulmer* (t).

In *Hewitt v. Morris*, the testator gave the residue of his estate and effects to his executors upon trust, to convert into money such parts as did not consist of money or stocks, and after payment of his debts to invest the surplus, and stand possessed of his said residuary estate, upon trust, as to one moiety, for *W. H.* for life, with remainders over, and as to the other moiety for *I. H.* for life, with remainders over. *W. H.* and *I. H.* claimed in equal shares 374*l.*, the amount of dividends accrued on the stocks, which constituted part of the testator's personal estate at his death; and Lord *Eldon* allowed the claim.

In *La Terriere v. Bulmer*, the testator gave the residue of his real and personal estate to trustees upon trust, to be converted into money; and as to two-thirds of the monies produced by sale, collection and conversion of his real and personal estates, after payment of debts and legacies, he directed his trustees to invest them on government or Parliamentary stocks, or funds of *Great Britain*, or on real securities in *England* or *Wales*, and stand possessed of the stocks, funds, and securities so to be acquired or purchased in trust for Mrs. *La Terriere* for life, and after her death for her children. At the testator's death the personal estate consisted of stock in the funds, *East India* bonds, and other public securities, shares in insurance offices and canals, mortgages, bonds, &c. Within a year after the testator's death, the trustees sold the real estates, and invested the proceeds in the funds. The bill filed by the infant children of Mrs. *La Terriere*, prayed that they, as tenants in remainder, might be declared entitled to have the whole of the interest arising within the first year after the testator's decease, on the two-thirds of the testator's residuary

(r) 1 Ja. & W. 308.

(s) 1 Tur. & R. 241.

(t) 2 Sim. 18, and the Decree, 22.

estate applied towards the increase of their shares. On the part of Mrs. *La Terriere*, the tenant for life, it was insisted that, at least, she was entitled to the first year's income, on what was found invested in the funds at the testator's death, and on what was so invested by the executors within the first year. Sir *Anthony Hart*, V. C., decreed accordingly, that she was entitled to the income accrued within the first year after the testator's death, on two-thirds of all such parts of the testator's estate as at the time of his death, existed in a proper state of investment, according to the directions of the will, and also of the income on all investments according to the will accrued due within the first year: and that the income accruing within the first year of two-thirds of such parts as were not in a proper state of investment, formed part of the capital of the two-thirds of the testator's residuary estate.

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over.

In *Douglas v. Congreve* (u), the testator gave the residue of his real and personal estate to trustees, upon trust to convert the same into government securities and invest them in their names, and pay the interest to *M. S.* for her separate use for life. One of the questions was from what time interest was payable, whether the tenant for life was entitled to the income during the first year from the testator's death. Lord *Langdale*, after adverting to the preceding authorities, and to the embarrassment arising from the unsettled state of the rule in cases like that before him, concluded his judgment as follows; "in a case where there is no direction to accumulate, and, therefore, to add interest to capital, it appears to me more likely to have been the intention of the testator, that until the lapse of such convenient time as may be allowed to the executor to make the conversion directed by the will, the tenant for life should enjoy the interest actually accrued; and if it should be held, as in *Dimes v. Scott* (v), that the conversion ought to be made in a year, I think that no inconvenience can follow from allowing the tenant for life the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year, or so much of that year as shall elapse before the conversion of the residue, according to the direction of the will.

But where part of the residuary estate directed to be converted remains unsold until the end of the first year, the rights of the

(u) 1 Keen, 410; see *Wrey v. Smith*, 14 Sim. 202, decided on the peculiar language of the will.

(v) 4 Rus. 195; see also *Caldecott v. Caldecott*, 1 Yo. & Coll. (C.), 312.

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tenant for life do not appear to be so well settled as with respect to those parts which at the death were in a proper state of investment, or which had been converted during the first year.

In *Gibson v. Bott* (w) next stated, the property consisted of a leasehold farm, stock and crops, sold during the year, and other leaseholds left unsold. Lord *Eldon* held the tenants for life entitled to the parts sold from the period of conversion, and to interest at four *per cent.* from the death of the testator on the value to be set on the leaseholds unsold. In that case, the testator bequeathed the residue of his personal estate subject to debts and legacies, to his executors, upon trust as soon as convenient after his decease, to convert into ready money so much thereof as should not consist of money, or of money already invested in the public funds; and place out the purchase-money, together with his other ready money in the public funds, or upon real, or government securities at interest; and he directed that they should stand possessed thereof, and of the interest and dividends, and of the funds and securities, wherein the same should be invested, upon trust, as to one moiety, to pay the clear annual interest and dividends to his daughter, *J. Davies*, for life, and after her death to dispose of the said moiety of all the said stocks and securities, &c. for the use and benefit of all the children of *J. Davies* at twenty-one, equally, if more than one. The testator made a similar disposition of the other moiety of the funds, in favour of his other daughter, *Letitia Gibson*, and her children. Part of his personal estate consisted of a leasehold estate in *Essex*, of about 450 acres, held for a term of thirty-nine years, at a rent of 315*l.* a year, part of which, about 210 acres, were let by the testator at annual rents, amounting to 407*l.* 12*s.* 6*d.*; and the remainder about 240 acres, were in his own possession. Upon that part of the farm, which he occupied, there was considerable live stock. *E. Gibson*, one of the executors, managed the farm from the testator's death till the following *Michaelmas*; when the whole farm was sold by the executors, with all the live and dead stock and crops; and the money produced by the sale was invested in the funds. Between the testator's death and the sale, a considerable profit was produced, not only in respect of the crops, but by the increase of calves, &c. and the improved state of the cattle. Some other leasehold estates, of which the testator was possessed could not be sold on account of defects in

(w) 7 Ves. 89, and see *Mehrtens* Dixon, 10 Sim. 636; *Chambers v. Andrews*, 3 Beav. 72; *Benn v. Chambers*, 10 Jur. 326.

the title. The clear residue was very considerable. The bill was filed by *Gibson* and wife for an account of the personal estate, as it stood *at the death of the testator*, praying that a value might be set upon the farming stock, cattle, growing crops, and leasehold estates, as they were at the day of the death: that the clear residue *on that day*, might be ascertained: for an account of the produce and profits arising from the farm, and the increase of cattle and rent of the leasehold estates from that time till the sale; that the clear residue of the personal estate, as it stood *at the death of the testator*, might be invested in the three *per cent.* Bank annuities, &c. and that what should appear to have arisen from the produce and profits of the said farm and increase of cattle, and by the rents received *from the day of the death*, might be declared to belong and be paid to *F. Davies*, and to the plaintiff, *E. Gibson*, in right of his wife, in equal moieties; or that a compensation might be made for the delay of the sale. The other executors stated by their answer, that the sale was postponed to *Michaelmas* as the most convenient time, and most for the benefit of the parties interested, with the concurrence of the plaintiff. Lord *Eldon*, C., said; "If an annuity is given, the first payment is made at the end of the year from the death: but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest. I remember when it was not clear in the case of the annuity, though it is so now, certainly. As to legacies, there is no other direction given now, than to compute interest from the end of a year from the death, except where the will directs any other time." When a testator gives interest of a fund, to be created by a sale as soon as conveniently can be, he means only the interest from the time the property can conveniently be sold. The whole practice of the Court is against such special directions as to the value of the property at the time of the death. As to the leasehold premises, that could not be sold, they cannot be considered otherwise than as property, which it was for the benefit of all parties to suffer to remain *in specie*; upon that I think the plaintiffs may have interest upon the value from the death; for there is a consideration for that. The best decree in this cause, will be to declare that the property to be converted has been converted in a reasonable time; that the persons entitled for life should have the interest from that conversion; and as to the other leasehold premises, that it being for the interest of all parties, that they should not be sold, a value shall be set upon

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them, and the persons entitled for life shall have interest at four *per cent.* upon that value, from the death of the testator."

In *Turner v. Newport* (x), the testatrix bequeathed her personal estate, and, as it would appear from the judgment, upon trust to be invested and the interest to be paid to A. for life, with remainder over. Part of the estate consisted of a sum recovered in respect of principal and interest due on a bond from a deceased debtor to the testatrix; but as the debtor's estate was insufficient to pay the debt in full, the sum recovered was less than the principal. Sir L. Shadwell, V. C., held, that the tenant for life was not entitled to the interest accrued since the testatrix's death, which would have been the case had the bond debt been specifically bequeathed, but that the whole sum recovered formed part of the testatrix's personal estate, and that the legatee was only entitled to the dividends on the stock purchased with the interest due at the testatrix's death; from this the legatee appealed; and Lord Cottenham, C., held that, as between the tenant for life of the residue and those in remainder, the former was not entitled to receive what had actually been recovered in respect of interest, but only the amount of interest at four *per cent.* on the sum which the bond would have realized if the debtor's estate had been administered at the end of a year after the testator's death (y). It is conceived that the same course would have been adopted if the bequest had been of a specific legacy, and not of part of a residue.

The case of *Dimes v. Scott* (z), relates to a sum of 2,000*l.* invested on *East India* security, making 10*l. per cent.*, and the decision of Lord Lyndhurst, C., was, that the legatee for life was entitled from the death of the testator, to the interest which the sum would have produced if invested according to the will, and that the surplus interest formed part of the corpus of the residue. There the testator bequeathed the residue of his personal estate to trustees, directing them after payment of his debts, to invest the surplus on government or real security, and stand possessed thereof; in trust to pay the annual produce to his wife for life, and after her decease, to *Elizabeth Wintersgill*. The testator appointed his wife and two others executors, who, after the testator's death in 1802, proved the will. Part of the testator's estate at the time of his death consisted of 2,000*l.*, invested in a fund of the *East India* Company, called the Decennial Loan, bearing interest at ten *per cent.* The 2,000*l.* remained upon the security

(x) 14 Sim. 32.

(y) 2 Phil. 14.

(z) 4 Rus. 195.

of the loan till 1813, when the principal was paid off, and invested in the 3*l.* *per cent.* stock, when that fund was so low that the sum purchased was considerably greater than it would have been, if the conversion had taken place at the end of the year from the testator's death. One of the executors received the interest at 10*l.* *per cent.* from the death of the testator to the period of investment; during which time he paid it over to the widow. *Elizabeth Wintersgill* and her husband filed their bill in 1820, insisting that the testator's interest in the Decennial Loan, ought to have been sold and invested according to the directions of the will, and the widow only entitled to the interest which the 2,000*l.* would have produced had it been so invested; that the surplus interest formed part of the residue of the testator's estate; and that the trustees were to be charged with the surplus of the 10*l.* *per cent.* which they had improperly paid to the tenant for life; and Lord *Lyndhurst*, C., decided accordingly.

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A decision in accordance with the principle of the preceding case, was made by Sir *L. Shadwell*, V. C., in *Crawley v. Crawley* (a), where the property in question was an annuity for a term of years, which the executors had been unable to sell; and it was held, that until the executors could sell it they must invest the payments, and the interest of the investments would belong to the tenants for life.

The case put by Lord *Eldon*, C., in *Fearns v. Young* (b), is a further illustration of the principle of giving interest on the estimated value of property wearing out. His Lordship put the case of a bond, of which the testator dies possessed for securing a sum of money two or three years after the testator's death without interest; in which case his Lordship said, as between the tenant for life and the remainder man, a value must have been set upon it at that time, and of its present worth the tenant for life would be entitled to interest *at least* from the year's end.

In the case of *Douglas v. Congreve* before stated (c), Lord *Langdale*, M. R., appears to have given the tenant for life from the death, until the end of the year or previous conversion, the interest of the whole of the mixed residue, not only of that which was in a proper state of investment according to the will, but the actual income of the residuary property, *in specie*, as it stood at the testator's death.

Previously to the last case the authorities seem gradually to have been at least approximating towards the adoption of a

(a) 7 Sim. 427.

(b) 9 Ves. 552.

(c) Page 1323.

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uniform rule, by giving interest from the death on the estimated value of property, not in a proper state of investment, and throwing the surplus into the corpus of the residue. From this rule, Lord *Langsdale's* judgment would appear to be a deviation; the course pursued by his Lordship may possibly be more conveniently carried out in practice than the other; but if the principle of estimated value was adopted, as an equitable adjustment of the interests of the tenant for life and the remainder man, it is a convenience obtained at the expense of the latter, in proportion to the difference between the interest on the estimated value, and the actual produce of the unconverted portions of the residue *in specie*.

In the subsequent case of *Taylor v. Clark (d)*, Sir James Wigram, V. C., after an elaborate and able discussion of the previous authorities, adhered to the rule of giving interest at 3*l.* per cent. on the estimated value, as adopted by Lord *Lyndhurst* in *Dimes v. Scott (e)*.

In *Taylor v. Clarke*, the testator directed his real and personal estate to be converted and invested in government or real security, and the annual produce to be paid to his wife for life, with remainders over. The testator's property, so far as it was brought before the consideration of the Court, consisted at his death of capital in a partnership business abroad, to be withdrawn by instalments in the course of three or five years, at the discretion of his executors, and bearing interest at 5*l.* per cent.; but no profits were made of the business after the death of the testator. Sir James Wigram, V. C., held the tenant for life entitled to the income actually produced by such of the property of the testator, as was invested according to the will from the time of such investment, but that during the first year from the testator's death, the tenant for life was not entitled to a larger income in respect of the testator's property, not so invested, than it would have produced if invested according to the will.

In *Mackie v. Mackie (f)*, Sir James Wigram, V. C., collected from the language of the will the testator's intention, that the tenants for life should enjoy the income which the residue of real and personal estate actually produced, in the interval between the testator's death and the conversion directed by the will, there having been no improper delay; but that they were not entitled, during that interval, to any interest upon such parts, or the value

(d) 1 Hare, 161; see also *Smith v. Pugh*, 6 Jur. 701; *Sutherland v. Cooke*, 1 Coll. (C.), 498; *Pickup v. Atkinson*, 4 Hare, 624.
(e) 4 Russ. 195.
(f) 6 Hare, 70.

of such parts of the residuary property as were unproductive. The testator in that case left the time and mode of sale entirely at the discretion of the trustees, and directed that until the sale and investment of his residuary property, the income should be paid to the same persons, and applied in the same manner as therein provided, for the dividends interest and income thereof after such investment.

Of bequests of residue for life, with remainder over.

2. In the *second* place we have to consider the rights of the tenant for life, where a residue consisting of a mixed fund is bequeathed to one for life with remainder over, and the will neither contains an express direction to sell and invest the produce in the funds or other security, nor any trust for accumulation.

2. When no trust to convert and no direction to accumulate.

It is conceived that the absence of any express direction to convert the residue does not affect the relative interests of the tenant for life and the persons in remainder, otherwise than that it may introduce the inquiry, sometimes of no small difficulty, whether the testator intended the entire residue to be enjoyed *in specie*, as well by the tenant for life, as those in remainder.

In the line of cases discussed under the first subdivision of the present section, the express direction to sell and convert the residue, and invest the proceeds on security, of course precludes the question as to the permanent enjoyment in specie; but where there is no such specific direction the inquiry is open. But assuming the absence of any such intention as to enjoyment in specie, the rules for the adjustment of the residue with regard to the relative interests of the tenant for life, and those in remainder are the same, whether there be or be not a direction to convert; for in the absence of any specific direction, it will nevertheless be the duty of the trustees, in accordance with the rules above discussed, to place the entire residue in such a state of investment as shall equally provide for all parties interested therein.

The rule and the reason of the rule in the disposition of the residuary property when bequeathed to persons in succession is clearly laid down by Lord Langdale, M. R., in *Alcock v. Slopers* (g), in the following words, "where a testator limits his residuary property to one life, with remainder over, it is *prima facie* to be intended that the testator means that the same property which is given to the tenant for life, should go to those entitled in

(g) 2 Myl. & K. 699, and see *Lichfield v. Baker*, 2 Beav. 481, 486.

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remainder; and if any part of the residue be of a wasting nature, as long annuities or leasehold estate, in order to effect this general purpose of the testator, such wasting property must be sold and converted into permanent property."

This rule is simple, but the cases cited in the preceding subdivision will shew, that the practical application of it to the varying circumstances of each case, has been productive of considerable conflict of opinion, and a corresponding diversity of practice.

The case of *Mills v. Mills* (h) falls within the present subdivision of our subject. There the testator devised and bequeathed all his real and personal estate to trustees in trust to pay the proceeds to his daughter for life, and after her death to her children, and in default of children, over. Part of the testator's personal property consisted of leaseholds, Bank stock, and turnpike securities. Sir L. Shadwell, V. C., being of opinion that there was nothing in the will, from which an intention could be discovered that there should *not* be a sale and conversion into three *per cents.* according to the general rule of the Court, and considering that the testator meant, there should be enjoyment of the proceeds of his personal estate generally, held that the leaseholds and Bank stock should be sold; and that, as to the latter, not because it was not a permanent fund, but because it depended on the will of the directors of the Bank, whether the casual profits (which were full as valuable as the ordinary profits), should go to the tenants for life, or should form part of the capital of the stock: and the Court would not allow the interests of the tenants for life, and of the remainderman, to depend on the directions that the Bank might think proper to give respecting *bonuses*. His Honor further held that the tenant for life must refund what she had received, more than she would have received, if the leaseholds and the stock had been sold, and the proceeds invested in the three *per cents.* An inquiry was also directed whether the turnpike securities were real and permanent securities, (*i. e.*), whether they permanently yielded the interest that was payable on them.

The well established rule of the Court adverted to by Sir L. Shadwell was adopted in the decree of the 7th May, 1796, in *Howe v. Earl Dartmouth* (i).

The case of *Fearns v. Young* (j) falls within the present class of cases, and illustrates the rule as applied to the current profits

(h) 7 Sim. 501.

(i) 7 Ves. 138.

(j) 9 Ves. 549.

of a partnership trade, carried on for the joint account of the surviving partners, and the representatives of a deceased partner.

Of bequests of residue for life, with remainders over.

In that case, *James Fearn*, by will, in 1797, bequeathed to his wife *Hannah* the interest of one-half of his "property" during her life, with liberty during her life to dispose of one-half thereof to whomsoever she might think proper at her decease; the other half to devolve at her death to his daughter *Louisa*. The other half of his said "property" the testator gave to his said daughter; and appointed his wife and two other persons executors. Under a decree, upon the bill of the infant daughter of the testator against the executors, the Master stated the accounts of the principal and interest of the testator's estate; and as to the sum of 2,070*l.* 13*s.* included in the sum of 2,769*l.* 5*s.* 10*d.* appearing as interest money, the report stated that it arose under the following circumstances: The testator was partner in a wine merchant's house at *Madeira*, and by articles of partnership it was provided, that in case of the death of either of the partners before the expiration of the partnership, which was for seven years, the business should be carried on for the joint account of the survivors, and the representatives of the deceased partner, until the 30th day of *June* next following, provided the death happened at the distance of three months before that day, otherwise to continue until the same date the following year; that the partnership should then determine, an account be stated and delivered, and the balance, which might be liquidated, should be divided, and the proportional share of the deceased or his representatives paid; one-half at the end of one year, and the other half at the end of two years after such termination. The balance had been paid accordingly. The testator having died in the latter end of *May*, 1797, there were thirteen months of the term unexpired, and his proportion of the profits during that time amounted to 2,070*l.* 13*s.*, of which the widow claimed one-half, namely, 1,035*l.* 6*s.* 6*d.*, which the Master allowed was due to her in the nature of interest money accrued due after the death of the testator. Exceptions were taken by the plaintiff, on the ground that the sum claimed by the widow ought to have been disallowed, as having arisen from the profits of the testator's capital in trade, and not from interest of his property. Lord *Eldon* allowed the exception, and decided that the widow ought to have, *from the death* to the termination of the partnership, interest at a given rate, and not the profit; and then, at the end of the partnership, the capital by the articles was a dead fund, in moieties for one and two years; but she was not, there-

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fore, to be deprived of interest upon it, but was entitled to interest upon the capital, though dead, with reference to the circumstance, that one-half was not to be collected till the end of one year, the other not till the end of two years; calculating what was then the value of the same respectively: for instance, the value of 1,000*l.* payable at the end of one year, and another sum of 1,000*l.* payable at the end of two years; and his Lordship declared, that the minutes must be arranged upon that principle. In the course of his judgment, his Lordship observed, that in the case before him there was great difficulty as to the arrangement; and, making his decree, he appears to have conformed, as closely as the peculiar circumstances of the case would allow, to the rule he had previously laid down; namely, "what was not specifically given, and consisted of an interest wearing out, or an interest at present saleable, but in point of enjoyment future, the whole is converted into money in a question between the tenant for life and the remainderman;" and his Lordship observed, that though the general rule as to legatees was, to give interest from the end of one year from the death, he had seen a variety of decrees, directing inquiries how much of the fund had arisen from interest, and how much from capital, in order to determine between the tenant for life and remainderman. His Lordship considered the capital formed at the end of thirteen months, but not payable until one and two years after, as analogous to the case of a bond before referred to. With respect to the year in which the profit was making upon the testator's capital, his Lordship considered that, as the capital was employed in trade, and making much greater interest than four pounds or five pounds *per cent.*, it would be hard if the widow were not entitled to profit or rent.

3. Trust to
convert and to
invest in real
estate to be
settled, no di-
rection to ac-
cumulate, but
until purchase
dividends to be
applied as rents
of estate if
purchased.

3. In the *third* place we advert to the rights of the tenant for life to the interest of a mixed residue of personal estate, bequeathed to trustees in trust to convert it into money, and invest the produce in the purchase of real estates to be settled upon one for life, with remainders over; and where there is no trust for accumulation of the income until the principal is invested in real estate; but there is a direction to invest on government or real security in the meantime, and to apply the income as the rents of the real estate would be applicable when purchased.

Thus, in *Angerstein v. Martin* (k); *John Julius Angerstein*, by

will, in 1823, devised freehold estates in *Norfolk*, *Lincoln*, and *Suffolk*, to Sir *George Martin* and *Andrew Henry Thomson* and their heirs to the use of *John Angerstein* for life, with remainders over to the children of *John* for life respectively, with divers remainders to their children in strict settlement. The testator bequeathed the residue of his personal estate to his said trustees, upon trust to convert it into money; and as to four-tenth parts thereof, with all convenient speed (with the consent of *John Angerstein*, during his life, &c.) to invest the same in the purchase of lands, to be settled to the uses thereinbefore declared of his *Norfolk* estates; with a proviso, that in the meantime, and until the said four-tenth parts of the said trust monies should be laid out and invested in a purchase or purchases, it should be lawful for the trustees, with such consent as aforesaid, from time to time to invest the same in their names, in stocks, funds, government, or real securities; the dividends, &c., thereof to be applied, as the rents and profits of the real estate when purchased: and as to the remaining tenth parts of the trust monies, the testator directed the trustees to invest them in the purchase of lands, to be settled to the uses, &c., before declared, of his *Lincoln* and *Suffolk* estates, with a like power of investing the monies in the meantime in stock, &c. The testator appointed the trustees his executors, and died on the 29th of *January*, 1823, leaving the said *John Angerstein*, his only son, and *John's* several children named in the will, living at the testator's decease; but none of the grandchildren had any issue. The testator died possessed of a very large personal estate; the interest of the clear residue in the hands of the executors amounted to many thousand pounds *per annum*. *John Angerstein*, within a year after the testator's death, filed his bill against his children, the tenants for life in remainder, and against the executors, for the purpose of having the question determined, whether he, the plaintiff, was entitled to the annual interest of the clear residue of the testator's personal estate, from the time of his death, or whether the amount of such interest, during the first year after the testator's death, formed part of the general residue of the testator's personal estate, for the benefit (after the expiration of the first year) of the plaintiff during his life, and of the devisees in remainder after the death of the plaintiff. The defendants, the executors, stated, that they were prepared to advance 300,000*l.* in case an eligible purchase should offer; and they submitted that, had such purchase and settlement been

Of bequests of residue for life, with remainders over.

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made, the tenant for life would have been entitled to the rents from the date of the contract. Lord *Eldon* decided, that the tenant for life was so entitled from the *death*; observing, "The question then is, whether, as the testator has given the tenant for life an immediate interest in the real estates, and has directed that, if in the course of the year an estate should be bought, the tenant for life should be entitled to the rents from the time of the purchase, although the year has not elapsed, and has also directed as to the personal estate, that it shall be laid out on mortgage, or in the stocks, a direction which would not compel the trustees, if they found money on good security, to call it in, there can be any inconvenience in saying, that the tenant for life is entitled to the interest of the personal estate from the death of the testator. This case is clearly distinguishable from those (l), to which I have referred, and I think with respect to the interest of so much of the personalty bearing interest, as is not necessary to be applied for the payment of debts or legacies, the tenant for life is entitled to it from the *death* of the testator. I know of no case which prevents executors, if they choose, from paying legacies on handing over the residue within the year; and, if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing."

Upon this case Sir *James Wigram*, V. C., in *Taylor v. Clark* (m), observes, "Lord *Eldon* gave the tenant for life the income of property directed to be laid out in land, during the first year after the testator's death. Part of the property was in *Russian* funds, a security in which it would not have been lawful for the trustees either to have placed it, or to have left it. It was not in a proper state of investment. But Lord *Eldon* made no distinction between the income of that and the other property. The present Master of the Rolls has since followed that case in *Douglas v. Congreve*, giving a tenant for life the income of the residue during the first year after the testator's death, without reference to the investment in which he found it. In the absence of such an authority as the last, I should have thought it clear that the distinction taken by the Vice Chancellor, in *La Terriere v. Bulmer*, was right; and that Lord *Eldon*'s decree, in *Angerstein v. Martin*, was not intended to impeach the law as laid down in *La Terriere v. Bulmer*. For, although Lord *Eldon*'s

(l) *Sitwell v. Bernard*; *Entwistle v. Markland*, and *Stuart v. Bruere*, stated in the next section.
(m) 1 Hare, 171.

order, in *Angerstein v. Martin*, included *Russian* stock, the language of his judgment appears to apply to funds in their proper state of investment, and to no others; and I cannot but think that Lord *Eldon*'s attention was not called to the *Russian* funds, or at least not directed to them in the language he used. His argument is this, 'The testator gives the rents of the land from the moment it is purchased, and he gives the income of the money which is to purchase the land, until it is purchased, to the same persons, and in the same way, as the rents of the land when purchased.' Now this is true as regards the income of the money, when in its proper state of investment, but not before. How then can the argument apply to the income of property not invested in the manner directed by the testator. Where the Court in the common case, for the purpose of giving the tenant for life an immediate income, considers and treats the property as converted, though not actually converted, it gives the tenant for life that income only which the testator gave and intended the tenant for life should have. If he is to have the actual income during the first year, why should he not have it continuously, until the proper investment is actually made? If I am wrong in supposing that *Angerstein v. Martin* must be so understood, I must consider Lord *Lyndhurst* as having overruled *Angerstein v. Martin* to that extent, by *Dimes v. Scott*; and I should have no difficulty to contend with, if *Douglas v. Congreve* had not revived *Angerstein v. Martin* at the expense of *Dimes v. Scott*. Upon the case of *Douglas v. Congreve* I observe, with great humility, that it appears to me to be a decision which, if indiscriminately applied, would often work injustice."

Of bequests of residue for life, with remainders over.

A review of the authorities in the three preceding sub-sections would seem to authorize the following conclusion as the result of the balance of judicial opinion, namely, that where a mixed residue of personal estate is bequeathed to one for life with remainder over, either with or without an express direction to convert, and there is not any trust for accumulation, there the tenant for life will be entitled, from the death of the testator, to the interest arising from those parts of the residue in a proper state of investment, according to the will, and from those parts which are converted during the first year from the time of conversion; and he will also be entitled to interest from the death at the rate of 3*l.* per cent. on the net value of all those parts which are not in a proper state of investment, as estimated at the end of the first year from the death.

Where residue is given to one for life, with remainder over, and accumulation directed until the residue is converted.

4. In the *fourth* place we consider the rights of the tenant for life to interest, where a residue is given to one for life, with remainders over, to be invested in lands or other security; and there is a trust for accumulation until the fund be so converted.

But where a residue is directed to be laid out in land, to be settled on one for life, with remainder over, and the testator directs the interest to *accumulate* in the meantime, until money is laid out in land, or otherwise invested on security, the Court of Chancery has determined, that the accumulation shall cease *at the end of the year* from the testator's death, and from that period the tenant for life shall be entitled to the interest.

This was the only point decided in the case of *Sitvoell v. Bernard* (n), which, with the previous cases of *Entwistle v. Markland* (o), and *Stuart v. Bruere* (p), as Lord *Eldon* remarks, establish the converse of the principle laid down in *Angerstein v. Martin*.

In *Entwistle v. Markland*, *Henry Entwistle*, after directing his debts and legacies to be paid out of his personal estate, bequeathed all his money, securities for money, and personal estate whatsoever, to the defendant and others, upon trust, as soon as might be after the testator's death, to call in all the money due to him upon the said securities or otherwise, with the interest thereof, and to convert all his other personal estate into money, and with all convenient speed to lay out the whole of such monies, and the interest thereof to *accrue and accumulate* in the meantime, in the purchase of freehold lands and tenements of inheritance in *England*, to be conveyed to his trustees; which, with his other real estates, were declared to be to the use of his brother, *Robert Entwistle*, for life, *sans waste*; remainder to trustees, to preserve contingent remainders; remainder to the first and other sons of *Robert* in tail male; with remainder to the plaintiff for life, &c.: and the testator appointed his trustees executors. By codicil, the testator, for the better collecting and getting in his personal estate, empowered his executors to settle all accounts, and to continue, or call in and lay out again, until proper purchases could be found, all or any part of his money at interest, on such security, real or personal, or funds, as they

(n) 6 Ves. 520; see Lord *Eldon's* observations on his own decision in this case in the above case of *Gibson v. Bott*, 7 Ves. 95, in *Angerstein v.*

Martin, 1 Turn. 238, &c.; *Hewitt v. Morris*, Ib. 244.

(o) 6 Ves. 528.

(p) Ib. 529.

should think proper. The testator died upon the 25th of *January*, 1784; *Robert Entwistle* also died upon the 30th of *April*, 1787; and the plaintiff prayed by his bill, that he might be declared entitled to the interest of the residue of the testator's personal estate from the death of *Robert*. It appeared from the Master's report, that the first tenant for life had possessed a considerable part of the personal estate, and agreed to sell real estates of his own to the executors for the uses of the will. That there had been opportunity of laying out part of the personal estate, which had not been so laid out; and that several parts of the personal estate were out upon mortgages, on which it had become impossible, for want of heirs, and persons abroad, to get in the money; the report having stated the evidence of an attorney as to what he had done for that purpose. Upon farther directions, it was declared, that the testator's personal estate not having been applied, as the same was received, in the purchase of real estates, pursuant to the directions of the will, the plaintiff was entitled, and ought to receive the interest of such personal estate, or of such part thereof which had been got in and not so applied, from the death of the testator. It was ordered, that the several sums of interest, appearing, by the Master's report of the 30th of *December*, 1794, to have been paid into the hands of *Jones and Co.*, at two and three *per cent. per annum*, amounting to 425*l.* 4*s.* 10*d.*, and the sums of 597*l.* 2*s.* 8¼*d.* and 295*l.* 17*s.* 6*d.*, received by *Markland* and *Chadwick* on account of such interest, be paid by the defendants to the plaintiff out of 3,405*l.* 17*s.* 10*d.* paid into the bank of *Jones and Co.*: and that the remaining sum of 4,140*l.* 15*s.* 4*d.*, the balance of 5,543*l.* 12*s.* 3¼*d.*, the total amount of such interest reported to have accrued from the death of *Robert Entwistle*, and which was then outstanding, together with the future interest of the outstanding personal estate of the testator, until the same should be got in and invested in the purchase of lands, be paid to the plaintiff so soon as the same should be received.

Where residue is given to one for life, with remainder over, and accumulation directed until the residue is converted.

In *Stuart v. Bruere* (q), *E. E. Hewer* devised to the defendants *Bruere* and *Spooner* an undivided fourth part of a freehold estate at *Clapham, Surrey*, upon trust that they should as soon as conveniently might be after her decease, sell the same, and out of the money and the rents and profits accruing before the sale, pay all incumbrances which at the time of her death might be upon

(q) 6 Ves. 529, note.

Where residue is given to one for life, with remainder over, and accumulation directed until the residue is converted.

her share of any money upon the public funds; and the remainder of all such profits of the said premises till such sale, she directed her trustees to place out on government securities, upon trust to pay the interest to the plaintiff, her nephew, for life; and after his decease to his son or sons equally, for life; and after their deaths, to transfer one moiety of the government securities to the defendant *A. Blackborne*, and the other moiety to the defendant *C. Cockerell*. The testatrix then devised to the same trustees her undivided fourth part of a freehold estate at *Fotheringay, Northamptonshire*, and other freehold estates, together with all her money in the funds not thereinbefore disposed of, upon trust to sell the said premises and money in the funds, and thereout and out of the rents and profits till sale, to pay certain incumbrances, debts, legacies and funeral expenses and after such payments she declared a trust to apply the remainder of what should arise by sale of her share of the estate at *Fotheringay*, and of her other premises, together with her money in the funds, for and upon the same uses and trusts, as what should arise by the sale of her share of the estate at *Clapham*, after payment of all incumbrances. She then devised to the same trustees her freehold and copyhold estates at *Warfield Villa, Berks*, and her furniture therein, and other specific effects, upon trust that they should, as soon as conveniently might be after her death, sell the same, and all the residue of her personal estate; and place out the money, and the rents and profits before the sale, on government securities, and pay the interest to the plaintiff for life; and after his death to his eldest son for life, and then to other persons. The testatrix died on the 10th of *January*, 1785. The plaintiff, who was her heir-at-law, insisted by his bill, that he was entitled to receive the rents and profits of the real estates and the dividends of the money in the funds, from a reasonable time after the testator's death; and that they ought not, until all the estates were sold, to be considered as part of the principal to be laid out upon the trusts of the will. The decree, made at the Rolls, on the 2nd of *December*, 1785, after directing the general account of the testatrix's personal estate and its application, and the payment into the Bank (it being admitted that some part of the testatrix's real estate had been sold) directed an account of the money; and the rest of the estates to be sold in the usual manner; and the money to be carried to the account of each estate; and then directed an account of the rents and profits of the real estates, distinguishing the rents of each, accrued

since her death to the time of the sale or sales thereof, respectively received and to be received by the defendants the trustees; and what should be due on that account to be paid into the Bank, to be placed to the credit of the cause, to the like accounts as the money to arise by the sale of the estates respectively. The decree made by Lord *Loughborough*, C., in *July*, 1793, directed the defendant *Bruere*, as administratrix of her father *G. Bruere*, to retain 206*l.* 0*s.* 8*d.*, the balance due to her on the account of the personal estate; the sum of 660*l.* 0*s.* 9*d.* for principal and interest upon her legacy, and what should be taxed for her costs out of 2,088*l.* 8*s.*, the balance reported due on account of the rents and profits, and pay the residue out of the assets of her father; and to transfer several sums therein named standing in the names of the executors, of whom *G. Bruere* was the survivor, to the Accountant General, and pay the interest then due thereon to the plaintiff. By an order made in *April* 1794, it was directed that so much of the sum of 1,795*l.* 7*s.* 10*d.* three *per cent.* annuities, in trust in the cause, as would be sufficient to raise 414*l.* 14*s.* 4*d.* (*being interest accrued since the 10th of January* 1785, *the day of the testatrix's death*), of 219*l.* 5*s.* 6*d.*, part of the money received by the defendant *A. Blackborne*, and by him paid into the Bank, and laid out in the purchase of the said annuities be sold, and the sum of 414*l.* 14*s.* 4*d.* paid to the plaintiff: the residue of the Bank annuities to be carried over to the account of the testatrix's *Warfield* estate and general personal estate; and the dividends due and to become due upon the Bank annuities, until such sale and carrying over, and the future dividends of the residue of the Bank annuities, after such sale, be paid to the plaintiff for life, in like manner as the interest and dividends of the other Bank annuities, standing in the name of the Accountant General, to the several accounts in trust in the cause directed to be paid by the former orders of the Court. The reader will observe, in the foregoing case, that land was directed to be converted into money and invested in government securities, in which case the rule under consideration equally applies (*r*).

In the case of *Sitwell v. Bernard* (*s*), *Francis Sitwell* bequeathed all his personal estate to his executors for the payment of his legacies and annuities, debts and funeral expenses; and subject

Where residue is given to one for life, with remainder over, and accumulation directed until the residue is converted.

(*r*) See also *Vickers v. Scott*, 3 *Howe v. The Earl of Dartmouth*,
Myl. & K. 500. 7 Ves. jun. 137.

(*s*) 6 Ves. 522, 534; see also

Where residue is given to one for life, with remainder over and accumulation directed until the residue is converted.

thereto, he directed his executors, or the survivor, with all convenient speed, to lay out the residue of his personal estate in the purchase of manors, lands, &c., in *England*, of inheritance in fee simple in possession, to be settled as therein mentioned; and directed that the interest of such residue should *accumulate* and be laid out in lands, to be settled in like manner as he had directed the residue of his personal estate. The will then directed the limitations of the estates to be purchased in strict settlement to the testator's eldest son, *Sitwell Sitwell*, for life, with remainders over. By codicil he empowered his executors, in the settlement directed of manors, lands, &c., to be purchased with the residue of his personal estate, to secure out of such manors, &c., the annuities given by his will and codicil. The testator died in *September*, 1793, leaving a personal estate of 150,000*l.* and upwards; a considerable part of which being outstanding upon large mortgages, could not, as appeared from the Master's report, be got in, from the infancy of the heirs of mortgagors, and for other satisfactory reasons. In 1797, the bill was filed by *Sitwell Sitwell*, praying the necessary accounts, and that it might be declared, that the plaintiff was entitled to the interest of the clear residue of the personal estate, so far as such residue had not been laid out in the purchase of lands under the will, from the end of one year after the testator's death, or such other period as the Court should be of opinion the plaintiff was entitled thereto; that such interest might be paid to the plaintiff, and that such parts of the residue as had not been laid out in the purchase of lands, might be so invested, pursuant to the will, &c. It appeared that the executors had laid out part of the personal estate in the purchase of real estates, one of which they purchased of the plaintiff. One of the questions was upon the plaintiff's claim to the interest of the residuary personal estate, from the end of a year after the testator's death: and Lord *Eldon*, C., decided, that the tenant for life was entitled to the interest from the end of the year, and that the directions must be such as to provide for an appropriation as to legacies and annuities: as to legacies, both such as carry interest less than five *per cent.* and such as carry no interest till the time of payment. In the course of his judgment his Lordship said, "I would struggle for any construction rather than adopt a construction which, not from dilatoriness of the trustees but only from circumstances to which probably the testator did not look, has a tendency wholly to disappoint the intention as to the beneficial enjoyment." His Lordship further remarked, "that if

the Court can adopt a general rule of convenience, it must be, that it will act upon the enjoyment of the tenant for life at that period when, upon its own rule, it supposes the purposes, to be answered before the fund can be cleared, can be answered; and that here it is impossible to say that the tenant for life can have the interest of the residue before the time, when the fund can be constituted by an investment in land clear of debts, legacies and annuities, when all those can be provided for. The plaintiff therefore must wait one year. The question then will be, whether he is to wait longer? and if so, whether he must not of necessity wait, till the personal estate can be actually collected. Part may be collected from time to time in his life; and he might enjoy the rents and profits of the estates purchased with those parts. But it might happen, that no part might be got in in his life. Suppose these debts on mortgage were the only part of the personal estate; it is impossible to say when either of those funds could be realized. The Court is therefore driven, either to take the end of the year, upon the principle of general convenience, or to examine in each particular case, what convenient speed and reasonable diligence would have done; what negligence or the law of the country or other circumstances, have prevented; and make those inquiries at the hazard of obtaining no clear result. I am therefore disposed to say, justice requires that the plaintiff should have the interest from the end of the year; and the more so, because I am clear, that distributing that justice to him is consulting the essential interests of the persons in remainder; for then, from his death, they will have the benefit of that, whether the fund is converted into land or not; and if that is not done, the rule may press as hard upon them, and some of them may have no actual enjoyment of the money."

Where residue is given to one for life, with remainder over, and accumulation directed until the residue is converted.

In the case of *Kilvington v. Gray* (t), a similar determination was made; the only difference between it and *Sitwell v. Bernard* being, that in the latter case, the testator directs the personal estate to be laid out with all convenient speed; while in the former it is directed to be laid out, when a convenient purchase can be found in the county of *York*, which would produce a yearly rent equal to three and a half *per cent.* on the amount of the purchase money. The tenant for life was held entitled to the interest from the end of the year after the testator's death, until the residue was laid out as directed.

(t) 2 Sim. & Stu. 396; see also *Earl of Stair v. Macgill*, 1 Dow. & Cl. P. C. 24; *Tucker v. Boswell*, 5

Beav. 607; see also *Vigor v. Harwood*, 12 Sim. 172.

Where residue is given to one for life, with remainder over, and accumulation directed until the residue is converted.

It is scarcely necessary to observe, that where a legacy, whether residuary or particular, is given to one for life with remainder over, the interest of the legatee for life of course ceases upon his death, from which event the legatee in remainder becomes entitled to it. So also, where annuities are given out of a rent-charge to several annuitants for their lives, and after the death of the survivor, the rent-charge is directed to be sold, and the produce given to other legatees; those legatees will be entitled to interest on their legacies from the death of the surviving annuitant, though the sale could not possibly take place till afterwards. This was decided in *Stonehouse v. Evelyn* before stated (u), wherein Sir Joseph Jekyll, M. R., decided, that the legacies given out of the produce of the sale of the rent-charge should carry interest from the death of the surviving annuitant, but only in proportion to what the rent-charge brought in, and not more; for if there were a surplus beyond the interest, that must go to the heir-at-law.

We may close this sub-section with observing, that where a legacy, whether particular or residuary, is given to one for life, with remainder over to another, and such bequest consists of Bank stock, the tenant for life will be entitled to the whole amount of the dividends, however increased in consequence of the increase of dividend declared by the governor and company of the Bank; so that such increase be clearly and distinctly given to the proprietors as, or in the nature of *dividends* declared, and not as a gift of additional *capital*. This was decided in *Barclay v. Wainewright* (v,) where the reader will find the cases bearing upon the present subject stated in Lord Eldon's judgment.

But where the sum declared by the Bank or other corporation, as divisible among the proprietors, is not in the nature of annual *dividends*, but as a *bonus* or increase of *capital*, the tenant for life will not be so entitled; but it will form part of the principal, and be applicable accordingly (w).

But it is stated in *Paris v. Paris* (x), that the Bank have it in their power to give the *bonus* to the tenant for life.

In *Price v. Anderson*, before Sir L. Shadwell, V. C., on the

(u) Page 513; 3 P. Wms. 253.

(v) 14 Ves. 66.

(w) *Brander v. Brander*, 4 Ves. 800; *Paris v. Paris*, 10 Ib. 185; *Clayton v. Gresham*, Ib. 290; *Witts*

v. Steere, 13 Ib. 363; also *Hooper v. Rossiter*, M'Clel. 527; *Ward v. Combe*, 7 Sim. 634.

(x) 10 Ves. 190; see *Mills v. Mills*, *supra*, 1330,

18th *January*, 1847, his Honor held that the Royal Exchange Assurance Company, having by a resolution of a general Court, combined the bonuses and interest in one aggregate sum, to be paid to the shareholders or proprietors as dividends, that sum was to be considered as annual income and paid to the tenant for life of the fund (y).

Where residue is given to one for life, with remainder over, and accumulation directed until the residue is converted.

5. In the *fifth* place we notice a class of cases wherein the testator has manifested an intention that the tenant for life of the residue should enjoy the income of the various descriptions of property of which it is composed "*in specie*," that is, in the condition or state of investment in which the property was at the testator's death.

5. When tenant for life to enjoy residue in specie.

We have before extracted from the authorities the rule of the Courts of Equity, that, where the residue given to persons in succession consists of property of a wasting nature, such as leaseholds and long annuities, there to effect the general purposes of the testator's bounty towards all the legatees, the Court of Chancery directs the property of a wasting nature to be sold and invested in permanent security, to the interest of which, when so invested, the legatee for life will be entitled. But although this rule is founded on the assumed *prima facie* intention of the testator, it must, of course, yield to a contrary intention, if clearly expressed, or to be collected from the context of the will, that the property shall be enjoyed *in specie*. In referring to the cases cited in this subdivision, it will be seen that Judges have felt more or less difficulty in discovering this intention, and for the evidence of which they have gradually relaxed in the strictness of their requirements; so that, now, in doubtful cases, the Courts lean to the inference of intention that the tenant for life should enjoy the income of the residuary estate as the testator himself did up to the period of his death. In the case of *Hinves v. Hinves* (z), Sir James Wigram, V. C., noticed the gradual relaxation of the rule established by *Howe v. Earl of Dartmouth* (a), and observed, that, with few exceptions, the Court had, in later cases, leant against conversion, as strongly as was consistent with the supposition that the rule was well founded; and his Honor, in the course of his judgment, cites those cases.

. In *Alcock v. Sloper* (b), the testator gave his residuary estate to trustees upon trust to permit his wife to receive the rents, profits,

(y) MS.

(z) 3 Hare, 611.

(a) 7 Ves. 137.

(b) 2 Myl. & K. 699.

Of interest on
annuities.

dividends and annual proceeds thereof during her life for her separate use, and, after the death of his wife, he directs his trustees to sell his freehold house in *Oxford-street*, and also his leasehold houses by auction. Part of the testator's estate consisted of long annuities; and, upon the question by the legatees in remainder whether the widow was to enjoy the interest of the long annuities *in specie* during her life, or whether they were to be sold, and the produce invested in three *per cents.*, Sir *John Leach*, M. R. held, upon the construction of the whole will, that it was the testator's intention that the widow should enjoy the dividends of the long annuities *in specie*. The case of *Alcock v. Slopers* was preceded by *Collins v. Collins* (c), in which the leaseholds were held to be enjoyed *in specie*. The cases of *Pickering v. Pickering* (d), *Goodenough v. Tremamondo* (dd), *Vaughan v. Buck* (e), *Harvey v. Harvey* (f), *Daniel v. Warren* (g), *Oakes v. Strachey* (h), *Hinves v. Hinves* (i), *Cape v. Bent* (j), *Pickup v. Atkinson* (k), *James v. Gammon* (l), and *Hubbard v. Young* (m) have successively determined in favour of enjoyment by the tenant for life *in specie*. In *Smith v. Pugh* (n), Sir *L. Shadwell*, V. C., held the gift of the residue general, and not to be enjoyed *in specie*.

SECT. XIV. Of interest on annuities.

Annuities, as observed in the beginning of the present chapter, where no time of payment is mentioned by the testator, are considered as commencing from the death of the testator; and, consequently, the first payment will be *due* at the end of the year from that event; if, therefore, it be not made then, interest, in those cases wherein it is allowed at all, must be computed from that period. But when annuities given by will have not been duly paid, so that considerable arrears have accrued, and application has been made to the Court of Chancery for interest upon them, the Court has generally refused the application; yet if the person charged with the payment of the annuity, has at law incurred a forfeiture by non-payment, against which he is obliged to seek relief in equity, it seems that no assistance will be given him by the Court, except upon the terms of his doing

(c) 2 Myl. & K. 703.

(d) 4 Myl. & Cr. 289.

(dd) 2 Beav. 512.

(e) 1 Phil. 75.

(f) 5 Beav. 134.

(g) 2 Yo. & Coll. (C.), 290.

(h) 13 Sim. 414.

(i) 3 Hare, 609.

(j) 5 Hare, 24.

(k) 4 Hare, 624.

(l) 15 Law J., N. S. 217.

(m) 11 Jur. 177.

(n) 6 Jur. 701; see also *Johnson v. Johnson*, 2 Coll. (C.), 441.

equity; viz. by consenting to pay the grantee of the annuity the arrears due, with interest. Of interest on annuities.

Thus in *Ferrers v. Ferrers* (m), the Countess Dowager of *Ferrers* was, by settlement and will of her late husband, entitled to a jointure estate of 1,000*l.* a year, but was kept out of possession by *Washington*, the son of Earl *Robert*, her late husband, by a former wife. The Countess insisted upon the arrears and interest from the death of her husband, comparing it to the case of arrears of an annuity, or a rent-charge, which are decreed to be paid with interest. But Lord *Talbot*, C., said, "The arrears of an annuity or rent-charge are never decreed to be paid with interest, but where the sum is certain and fixed; and also where there is either a clause of entry or *nomine pænæ*, or some penalty upon the grantor, which he must undergo, if the grantee sued at law, and which would oblige him to come into this Court for relief; which the Court will not grant, but upon equal terms, and those can be no other, but decreeing the grantor to pay the arrears, with interest for the time, during which the payment was withheld: but interest for the rents and profits of an estate was never decreed yet, the sum being entirely uncertain: and though it may be said that the lady is entitled to an estate of 1,000*l.* a year, yet that is not sufficiently certain, being only the perception of the profits of an estate, which are not to be paid at any certain time, but only as the tenants of the land bring them in, some at one time, some at another."

Again, in *Batten v. Earnley* (n), a testator bequeathed an annuity of 20*l.* to *J. S.* for life, payable out of the personal estate, quarterly. The annuity was three years in arrear, and *J. S.* claimed interest upon the arrears: but the Court said, that this was only allowed where there were great arrears, and that it was not usual to compute interest for so small a sum.

It seems immaterial, whether the annuity or rent-charge be given by will or secured by deed.

Thus in an anonymous case (o) exceptions were made by the representative of Mrs. *Guidot* to the Master's report, for not allowing interest for arrears of her jointure: and Lord *Hardwicke*, C., said, "The rule of the Court for allowing interest for arrears of a jointure is not general, but the Court will expect a special case; as the being obliged to borrow money, and to pay interest for it, and then the Court will give interest from a

(m) Forr. 2.

Pickering, 9 Sim. 176.(n) 2 P. Wms. 168; *Stamper v.*

(o) 2 Ves. sen. 662.

Of interest on
annuities.

reasonable time, but this not being within the decree, nor within the reason of those cases, I will not allow it."

In *Robinson v. Cumming* (*p*), the defendant took an exception to the Master's report, because the Master had not allowed him any interest on two years and a half's arrears of an annuity, which he had purchased of the testator, Mr. *Sheffield*. It was a grant of an annuity by way of mortgage, and a power to the annuitant to enter in case of arrears, and to hold till he was satisfied all arrears, costs, and damages; but the annuitant had not entered for default of payment. Lord *Hardwicke*, C., overruled the exception, observing, "There is no instance where the Court has ever allowed interest upon the arrears of such an annuity; if, indeed, the annuitant had entered and been in possession of the estate charged with it, the Court would not have obliged him to have quitted the possession, unless the grantor had agreed to allow him interest for the arrears of this annuity down to the day."

In *Newman v. Auling* (*q*), a bill was filed for the arrears of an annuity of 30*l.* given to the plaintiff and her late husband, by her late father, during the lives of her father and mother, and the life of the survivor: and he secured it by bond. The defendant was devisee of the real and personal estate of the donor. Lord *Hardwicke*, C., decreed an account of the arrears, which were due ever since the year 1741, and interest at four *per cent.*, to be computed from the end of each half-year; and said, "as this was given by way of maintenance, and a bond with a penalty for securing the payment, the plaintiff was clearly entitled to interest upon the arrears; for the Court had gone farther where an annuity had been given for maintenance (*r*), and decreed interest, though it was only a bare simple grant of an annuity, without any power of entering, if charged upon real estate, and in arrear, or if secured upon a penalty to enforce the payment out of personal estate."

In *Tew v. Winterton* (*s*), *William Bacon Foster*, in contemplation of a marriage with *Frances Pewterer*, entered into a bond, bearing date the 20th of *February*, 1780, in the penalty of 10,000*l.* conditioned that he should, as soon as conveniently might be, convey sufficient freehold or copyhold estates, in trust to raise and pay to *Frances*, in case she survived him, for

(*p*) 2 Atk. 411.

(*q*) 3 Atk. 579.

(*r*) See Lord *Thurlow's* observa-

tions in the next case.

(*s*) 3 Bro. C. C. 493; 1 Ves. jun. 451, S. C.

life, a clear annuity of 600*l.* in full satisfaction and bar of dower, &c. By a memorandum subscribed to the bond, and signed by *Frances*, she declared that she freely accepted the said jointure in full bar and satisfaction of dower and thirds. On the 23rd of *February*, the marriage took place; and on the 15th of *April* following, *W. B. Foster* died. There being twelve years arrears of the annuity due, amounting to 7,200*l.*, the question was, whether *Frances* was entitled to interest upon the arrears; and it was stated that she had been obliged to borrow money for her subsistence, during the time such arrear was run, for which money so borrowed she had paid interest; and that the funds, out of which she was entitled to the arrears, had been actually carrying interest during the whole time. But Lord *Thurlow*, C., said, that if he were entitled to give interest, he must look into the cases for a ground upon which to do so. That the Court had never given interest, but where there had been some ground, from whence it could gather that there was a contract between the parties that interest should be paid; the ground from compassion was too loose and indistinct. That the reasons for giving interest could not turn on the fact, whether the party was or was not in distress. That the annuity being intended as a maintenance, was not in all cases a ground for its carrying interest: to take up the consideration in that way would be too much. That where trustees were bound to make regular payments, and had kept money in hand, the Court had given interest. His Lordship, therefore, ordered the arrears only of the annuity to be paid.

Of interest on
annuities.

But when annuities are secured by bond, no more interest can be recovered than what, with the arrears due, do not exceed the penalty of the obligation: because the amount of the penalty is considered the whole of the debt both at law and in equity (*t*).

In the case of *The Drapers' Company v. Davis* (*u*), set down to be heard upon the Master's report, in 1741, Lord *Hardwicke* allowed interest upon the arrears of an annuity, from the confirmation of the report, which was in the year 1713, in favour of the annuitant's representative; and said, that the Court often decreed interest from the time the demand was liquidated, although the debt did not carry interest in its own nature. In *Creuze v. Lowth* (*v*), the Lords Commissioners were of the same

(*t*) 3 Bro. C. C. 489; Dick. Rep. 305, 408, 514; 5 Ves. jun. 329; 6 Ves. Jun. 411.

(*u*) 2 Atk. 211.

(*v*) 4 Bro. C. C. 157.

As to the rate
of interest.

opinion, and considered the case of the *Attorney General v. The Brewers' Company* (x), then cited, as in point. But the order of the Lords Commissioners, allowing interest upon the arrears of annuities and legacies, from the confirmation of the Master's report, being afterwards reviewed by Lord *Loughborough*, C., he reversed it upon great consideration, observing, that debts or demands, not carrying interest in their nature, were not altered in that respect by the confirmation of a Master's report (y).

So, in *Mellish v. Mellish* (z), interest was refused upon arrears of maintenance.

SECT. XV. Of the rate or *quantum* of interest allowed on legacies; and herein, of legacies in colonial currency.

As to rate of
interest payable
on legacies.

The rule which the Court of Chancery has adopted in regard to the rate or *quantum* of interest to be allowed upon legacies, when the amount of it has not been ascertained by the testator, and the legacies have not been paid for a considerable time after they became due, has not been at all times steady and uniform. A distinction has been made, when the legacies were charged upon land, and when payable out of the personal estate only. In the first case, the Court has allowed four, and in the second, five *per cent.* interest (a). But the Court has of late exploded the distinction, and laid down the rule *generally*, to allow no more than four *per cent.*, without making any difference, whether the legacy were charged upon lands or personal estate (b). To this effect Lord *Hardwicke* laid down the rule in *Guillam v. Holland* (c), *Beckford v. Tobin* (d), and *Wood v. Briant* (e); as did Lord *Eldon* in *Sitwell v. Bernard* (f). In *Treves v. Townshend* (g), Lord *Thurlow* laid down the modern rule, as above stated, and said, that it was not to be varied, except under special circumstances (h).

(x) 1 P. Wms. 876.

(y) 2 Ves. jun. 157; also 1 Dick. Rep. 139, 178, S. P.

(z) 14 Ves. 516.

(a) *Swynfen v. Scawen*, 1 Ves. sen. 99; *Denton v. Shellard*, 2 Ib. 239; *Bryant v. Speke*, 1 Ib. 171; *Trimlestown v. Colt*, Ib. 277; *Moore v. Moore*, 3 Atk. 402.

(b) As to the rate of interest allowed by the Court of Chancery in

Ireland on legacies, see *Leslie v. Leslie*, 1 Lloyd & Gould, 1; *Purcell v. Purcell*, 2 Dru. & W. 217; *Pepper v. Bloomfield*, 3 Id. 499.

(c) 2 Atk. 343.

(d) 1 Ves. sen. 311.

(e) 2 Atk. 523.

(f) 6 Ves. 543.

(g) 1 Bro. C. C. 384.

(h) See also *Rocke v. Hart*, 11 Ves. 58.

An executor making use of the money himself (i), or neglecting to lay it out for the benefit of the estate, there being an express direction that he should lay out the property to accumulate (k), have been considered such special circumstances.

As to the rate of interest.

It seems to have been the rule of the Court, at one period, to have allowed the rate of interest to be governed by that which was permitted in the country where the person resided; and the funds were invested at the time of making the will. But this rule was shaken by the decision of Lord *Alvanley*, in *Malcolm v. Martin* (l), upon the principle, that the property is presumed to come into the hands of the executors within a year after the testator's death; after which period the executors are supposed to be able to make no more interest upon the capital than four *per cent.*

The case above-mentioned was to the following effect:—

Patrick Malcolm, late of the island of *Antigua*, bequeathed to his sister the interest of 1,000*l.* sterling for life, and at her death, that principal sum to be equally divided between the plaintiffs, the *Malcolms*. He also gave to the children of Mr. *John Glass*, deceased, and the children of Mrs. *Lyon*, the interest of 1,500*l.* for life, to be equally divided between them, and at their decease, the same to be divided between the grandchildren of each, *John Glass* and Mrs. *Lyon*; and appointed the defendants and others executors. The question was, what rate of interest should be allowed upon these legacies? and Lord *Alvanley*, M. R., after adverting to the prior cases (m), as conflicting, observed; “If the matter were *res integra*, I think there is no reason for giving more than the usual interest given by the Court. What is the ground upon which the Court gives four *per cent.* interest? that the fund is supposed in the course of the year to come into the hands of the executor, and that the executor can make four *per cent.* of it here. If it was made out indeed, that the fund was abroad, and greater interest made, it might be otherwise. But I am rather disposed to postpone the decision of this point.” The reporter adds, that his Honor afterwards decreed the interest to be at four *per cent.*

The case of *Raymond v. Brodbelt* (n), which may seem to militate against the last decision, was decided by Lord *Lough-*

(i) *Bate v. Scales*, 12 Ves. 402;
Mosley v. Ward, 11 Ib. 581.

(l) 3 Bro. C. C. 50.

(k) *Raphael v. Boehm*, 11 Ves. 92;
Dornford v. Dornford, 12 Ib. 127.

(m) Also cited by Sir W. Grant in his judgment of *Bourke v. Ricketts*, stated at length, *infra*, p. 1351.

(n) 5 Ves. 109.

As to the rate
of interest.

borough (o), upon its own particular circumstances. In that case, *Francis Rigby Brodbelt* bequeathed two sums of 10,000*l.* current money of *Jamaica*, to trustees, to be placed in the *British* funds, upon several trusts in favour of his two infant daughters, *Anna Maria* and *Jane Gardner*, and their children; and declared that his two daughters should be maintained and educated for the first six months after his death, at the expense of his estate; and that the interest of their legacies should not be so applied till after the expiration of that time, and appointed the defendant, his son, residuary legatee and executor; and died on the 9th of *December*, 1795. The testator at different times, prior to and since the date of his will, made several remittances to *England*, to be invested in stock; which sums were from time to time invested accordingly; and at the time of his death amounted together to the sum of 795*l.* Bank four *per cent.* annuities, and 15,500*l.* three *per cent.* consols. The bill was filed by the two daughters, with their husbands, against their brother, charging that the plaintiffs were entitled to the dividends and interest of the two legacies of 10,000*l.* each, from the testator's death, and that the interest ought to be computed according to the legal rate of interest in *Jamaica*. The defendant stated by his answer that he had, since the testator's death, laid out, &c., for the use of the plaintiffs, his sisters, several sums of money on account of their legacies, which, he believed, amounted to a larger sum of money than the interest; and he submitted that they were not entitled to *Jamaica* interest, upon any part of their legacies; and that, according to the true construction of the will, the amount of the current money, which was invested in the 15,500*l.* three *per cent.* consols, and 795*l.* Bank four *per cent.* annuities, was to be considered as applied in part payment and satisfaction of the two legacies of 10,000*l.* each; therefore, the stock ought to be received in part satisfaction of the legacies as and for the sum of 16,377*l.* 7*s.* 6*d.* *Jamaica* currency; being the amount of the current money, which was laid out in the purchase of such stock. Lord *Loughborough*, C., said, "The two daughters must be maintained for six months at the expense of the estate. That is directed expressly. The computation of interest will be upon the 10,000*l.* *Jamaica* currency from the death of the testator, till the time of the investment; and the dividends will go *pro tanto* in payment of that. They do not take the stock; but the stock stands as a security for the

completion of the investment. Antecedent to the time the investment is completed, the dividends are the executor's: but he must answer *Jamaica* interest till the investment is completed. The cases (*p*) referred to have no relation to this; which is distinct and specific. He directs 10,000*l.* currency to be remitted, to be invested. Suppose it had been paid the first day after his death. They must remit it here: but if they execute it punctually, and remit it the first day, from the death to the payment of the bill, they have the exchange: Suppose the remittance is not made till a year after the death, then the trust reposed in *Jamaica* upon his executors is not discharged, until the legacy is paid, with interest, according to the course of *Jamaica*. The Master must inquire what sum of money would have been necessary to have been invested in the three *per cents.* to have paid 10,000*l.* currency to each of the legatees at the time of the testator's death; and compute what is due to the plaintiffs upon their legacies, with interest, according to such currency, to the time the whole investment is made upon such sum, as the Master shall find would have been necessary for the investment. An account must be taken of what has been laid out for the maintenance of the plaintiffs since the expiration of the first six months after the death of the testator; during which they were maintained, and were entitled to be maintained, at the expense of the estate. All parties must have their costs" (*q*).

As to the rate
of interest.

The general rule, as laid down by Lord *Alvanley*, in *Malcolm v. Martin*, has been recognized and confirmed by Sir *William Grant*, in the case of *Bourke v. Ricketts* (*r*). In that case *George Robert Gordon*, by will, in 1799, bequeathed to each of the sons of his daughter, *Mary Bourke*, who were or might be living at the time of his decease (except the son named as one of his residuary legatees), the sum of 3,000*l.* current money of *Jamaica*; and he gave to each of his granddaughters, the plaintiffs, (naming them), 1,400*l.* current money of *Jamaica*; and he also bequeathed to all and every other the children of his said daughter, who then were or might be born, and living at the time of his decease, 1,400*l.* current money of *Jamaica*, unto each of them; which aforesaid sums he thereby directed to be paid unto all of them, or their order, or legal appointment, his aforesaid grandchildren,

(*p*) *Roberts v. Pocock*, *supra*; *Stapleton v. Conway*, 1 Ves. sen. 427; *Malcolm v. Martin*, *supra*.

(*q*) See Sir *William Grant's* com-

ment upon the judgment of the above case in *Bourke v. Ricketts*, 10 Ves. 332.

(*r*) 10 Ves. 330.

As to the rate
of interest,

as soon as the aforesaid different sums should be raised and paid out of his estate, made subject and liable to the paying all his debts, &c. He gave other legacies, and disposed of the residue of his real and personal estate. The testator died on the 24th of *December*, 1799. Four of his executors proved the will in *Jamaica*; and it was also proved in this country by the fifth executor, residing here. The assets in each country were ample. By the decree, pronounced by the Master of the Rolls, upon the bill of the grandchildren, the usual directions were given for taking the accounts, &c.; and, that the Master should compute interest upon the legacies from the end of one year from the death of the testator, after the rate of four *per cent. per annum*, unless any other time of payment or rate of interest was appointed by the will, &c. The plaintiffs presented a petition of rehearing, on the ground, that they were entitled to interest, at the rate of six *per cent.*; being the legal rate of interest in *Jamaica*, where the testator died. But Sir *William Grant*, M. R., rejected the petition, observing, "This petition of rehearing is presented upon the ground, that the decree directed interest at four *per cent.* only. The testator gave legacies in the currency of *Jamaica*, where he resided; and it is contended, that they ought to carry *Jamaica* interest. He had personal property in *England*, and in *Jamaica*; and he appointed *English* and *Jamaica* executors. It does not appear that the *English* executor has received any remittance since the testator's death. The legatees might have sued either the *Jamaica* executors in *Jamaica*, or the *English* executor in *England*. They have preferred the latter, and to take payment out of the *English* fund. Therefore, I think, they cannot have *Jamaica* interest. I should think so, even if some part of the property had been remitted here. The principle, upon which interest is computed upon legacies, from a year after the death of the testator, is the presumption, that the property is got in at that time, and is making interest. I cannot presume, that the *English* executors made *Jamaica* interest; or, that the property in the hands of the executor in *England* is carrying *Jamaica* interest. The authorities are not uniform. In *Saunders v. Drake* (s), it appears by the registrar's book, that *Jamaica* interest was given. The main point contended was, whether the legacy should be in *Jamaica* or *English* currency. The testator had property in both countries. Lord *Hardwicke* gave *Jamaica* interest; but in *Stapleton v. Conway* (t), a subse-

(s) 2 Atk. 465.

(t) 1 Ves. sen. 427.

quent case, eight years afterwards, he appears to have entertained a different opinion. In *Pierson v. Garnet* (u), before Lord *Kenyon*, one question was, whether the payment was to be in *English* or *Irish* currency; and though it does not appear by the report, it is well known, Lord *Kenyon* gave four *per cent.* (x). In *Malcolm v. Martin* (y), this point was directly considered by Lord *Alvanley*. It was not argued either in *Pierson v. Garnet*, or *Saunders v. Drake*. In *Raymond v. Brodbelt*, the case before Lord *Alvanley* was cited as decisive of the point. Lord *Rosslyn* does not disapprove Lord *Alvanley*'s decision; but gives the reasons for his opinion, that under the circumstances of the case before him, *Jamaica* interest should be given. It is very clear, Lord *Rosslyn* did not mean to lay down any general rule. All the arguments in that case turned upon the particular circumstances; especially the argument of the present Lord Chancellor, then Attorney General, that *Jamaica* interest ought to run on to the time of payment: the property having been in *Jamaica* some time; and, while there, carrying *Jamaica* interest; and having been remitted upon advantageous terms in the course of exchange, giving a profit, at least equal to *Jamaica* interest. Lord *Rosslyn* does not appear to me to have in any manner overruled Lord *Alvanley*'s decision, but rather to have confirmed it."

As to the rate
of interest.

The principle of the above rule, as founded in consideration of the conveniency of the parties, with a view to the rate of interest at which money can be reasonably obtained, accounts for those instances which have occurred since the commencement of the modern rule, and which may hereafter arise, wherein interest has been or may be allowed at a greater rate than four *per cent.* In *Inclendon v. Northcote*, Lord *Hardwicke* allowed interest to the legatees at four and a half *per cent.*, and assigned the reason for so doing, that the interest of the money had altered within the two preceding years, mortgages then being at 4*l.* 10*s.* and several at five *per cent.* But this rule of the Court only applies to cases, where no interest is provided or given by the testator; for if he have the power to give legal interest, and does so, or if he give interest at a less rate than four *per cent.*, the Court cannot reduce or augment it, even in the instance of children's portions (z).

In *Andrews v. George* (a), interest at 4*l.* *per cent.* was directed to be computed on advancements made by the father to his children,

(u) 2 Bro. C. C. 38.

(x) 2 Ib. 53.

(y) *Supra*, p. 1349.

(z) *Supra*, p. 1261.

(a) 3 Sim. 393.

As to the rate
of interest.

from the time when the father's property was divisible amongst them, the will directing deductions to be made from the children's shares in respect of such advances.

Where as in *Sutherland v. Cooke* (b), a will contains an implied but no express direction for conversion of the property, and by an innocent mistake, it has been left upon the original security, and the income enjoyed by the tenant for life in specie, the Court, upon the mistake being rectified, will, at its discretion, allow the tenant for life interest at the rate of 4*l. per cent. per annum* upon the value of the property, as taken at the expiration of one year from the testator's death. Sir *K. Bruce*, V. C., in that case observed, there was no positive rule on the subject. A will might be so framed as to make it the duty of the Court to consider the property as laid out in the 3*l. per cents.* But where there was no specific direction for conversion, and by an innocent mistake, the property had been left upon the original security, he was of opinion that it had always been considered competent to the Court to allow the tenant for life interest, at 4*l. per cent.*, and his Honor thought that consistently with *Howe v. Earl of Dartmouth* (c), and *Dimes v. Scott* (d), he might do it in the present case.

Power to
charge a gross
sum implies a
power to charge
interest.

A power to charge a *gross* sum upon an estate, imparts a power by implication to charge it with interest; it was accordingly held in *Kilmurry v. Geery* (e), that if a person have power to charge land with any sum not exceeding 3,000*l.* he may charge it with 3,000*l.* and the interest besides; for the intention was to charge the premises with 3,000*l.* principal money, and that of course carried interest, for no man would lend such a sum on such security, if the law were otherwise.

Interest com-
puted on inte-
rest reported
due.

It is the practice of the Court of Chancery, as acknowledged in the case of *Perkyns v. Baynton* (f), when subsequent interest is directed to be computed upon a mortgage, to compute it upon the principal and *interest* before reported due; but in cases of bonds or *legacies*, upon the *principal* only. In that case a sum of money was charged by will upon land, as a reward for care taken of the testator's daughter, who was a lunatic; and Lord *Thurlow*, C., considered it as the common case of a legacy, and directed interest upon the principal only. The reason of this

(b) 1 Col. 503.

(c) 7 Ves. 137.

(d) 4 Russ. 195.

(e) 2 Salk. 538; *Hall v. Carter*,

2 Atk. 354; and *Lewis v. Freke*, 2 Ves. jun. 507, *S. P.*

(f) 1 Bro. C. C. 574.

distinction between mortgages and other debts and legacies, appears to be this; in the case of a mortgage, the mortgagee has a complete legal title, and cannot be obliged to part with his estate, before he has been fully satisfied in all his demands; but general creditors and legatees have no such lien, of which they can take advantage.

As to the rate
of interest.

But under particular circumstances, the Court will allow the legatee compound interest, as in the case of *Raphael v Boehm* (g), wherein *Edward Raphael*, of *Madras*, gave to each of his executors 1,000 pagodas, declaring such legacies to be in full for their trouble in performing the duties of the will; and that they should not have any claim for commission, or derive any advantage from keeping in their possession any sums of money, without duly accounting for the legal interest thereof, according to the legal rate of interest where they acted. The testator then gave the residue of his estate upon certain trusts for his children, and directed the interest of each child's portion, or a competent part thereof, to be applied for the maintenance of such child; and the surplus of such interest, if any, to be accumulated for the benefit of such child; and he directed his estate should be remitted to *England*, and laid out in the funds there, for the benefit of his children. The executor *Boehm*, neglected to lay out a considerable portion of the testator's property, which was remitted to him on account of the testator's estate, and he was decreed to pay interest at five *per cent.* on all sums of money, part of the testator's estate, received by or come to his hands from the time he received the same respectively, during the time the same continued in his hands; the Master being directed in such computation to make half-yearly rests. The object of this direction was to charge compound interest. The balance of receipts, with the interest calculated from the times of payment, was struck at the end of the half-year, and that balance, so composed of principal and interest, was carried forward as an item in the account producing interest. The neglect of the executor, in disobedience to the special directions of the testator for accumulation, appears to have been the principal reason for the decision (h).

Compound in-
terest allowed
under circum-
stances.

(g) 11 Ves 92.

(h) See also *Rocke v. Hurt*, 1b. 58; *Mosley v. Ward*, 1b. 581; *Dornford*

v. Dornford, 12 Ves. 127; *Goodchild v. Fenton*, 3 Yo. & Jerv. 481.

CHAPTER XXI.

Of the construction of Bequests generally.

SECT. I. Of joint-tenancy.

SECT. II. Of tenancy in common; where the legacy is given to two or more.

- 1.—*"In equal shares," or "share and share alike," or a distinct "share" pointed at.*
- 2.—*"Equally to be divided," &c.*
- 3.—*"Jointly," or "in joint and equal portions."*
- 4.—*"To and amongst."*
- 5.—*"Respectively."*
- 6.—*To two or more when they attain twenty-one.*
- 7.—*Where words of survivorship are coupled with words of tenancy in common.*

A.—*The survivorship confined to testator's death.*

1.—*Where the period of division of the fund was the death of the testator.*

2.—*Where the period of division was subsequent to testator's death.*

B.—*Where the survivorship confined to death of tenant for life.*

C. ——— to minority of legatees.

D. ——— to dying without issue.

8.—*Exception, where the bequest construed a joint-tenancy, notwithstanding words of severance.*

SECT. III. Of the surviving of accruing shares.

1.—*Where the legacies do not compose an aggregate fund.*

2.—*Where the legacies do compose an aggregate fund.*

SECT. IV. Of Bequests wherein "*or*" was construed "*and*;" and "*and*" construed "*or*."

- 1.—*Or* construed *and*.
- 2.—*And* construed *or*.
- 3.—*Where the words "or," and "and" have been construed literally.*

SECT. V. Of bequests to the separate use of married women.

- 1.—*Where the bequest has been considered as giving a separate interest.*
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SECT. VI. What words of recommendation, &c. will raise trusts by implication.

- 1.—*Where the recommendation considered to raise trusts by implication.*
- 2.—*Where not.*
 - 1.—*When the recommendation not imperative.*
 - 2.—*When the property not distinctly ascertained.*
 - 3.—*When the objects not distinctly ascertained.*

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- 1.—*Instances of survivorship being implied.*
- 2.—*Instances wherein provision out of a fund is given to a legatee until a future event, and nothing further is added; and bequest of the fund implied.*
- 3.—*Instances where an ultimate bequest is added, if the event do not happen, there being no express bequest if it do; and bequest of the fund implied.*
- 4.—*Instances where the fund is directed to be paid to an individual for a partial purpose, for the benefit of a third person, and there is no express gift of the surplus.*
- 5.—*Instances of life interests implied.*

SECT. VIII. Of the construction of bequests, *where there is a mistake in the subject* bequeathed.

- 1.—*Of mistake in the nature or quality of the subject bequeathed.*
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- 3.—*Of mistake in the name thereof.*
- 4.—*Mistake not corrected upon mere supposition, but must demonstrably appear such.*
- 5.—*Of parol evidence in the above cases.*

SECT. IX. Of construction of bequests generally.

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II. Secondly.—*Cases in illustration of those rules.*

- 1.—*Effect ought to be given to the whole will if possible, so that every word may have effect, unless inconsistent with the general intention.*
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- 3.—*Bequest probably intended, but not actually made.*
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III. Thirdly.—*Of the construction of particular words and phrases.*

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- 6.—*Of the words "all my lands and tenements," whether they include leaseholds.*
- 7.—*Of a bequest "to a parish church," or to the "parish."*
- 8.—*Of a legacy to a parent for maintenance of her children.*
- 9.—*Of a bequest to a legatee to apprentice him, or for his advancement in business, &c.*
- 10.—*Of a bequest to A. for life, and after the death of A. and B. to C.*
- 11.—*Of a bequest to legatees "at the discretion" of trustees, executors, &c.*

- 12.—*Of a bequest to invest money “in securities at discretion.”*
- 13.—*Of words of reference “in like manner,” in manner aforesaid, &c.*
- 14.—*Of the “balance” of an account current.*
- 15.—*Of the words “house I live in and garden.”*
- 16.—*Of the words “appurtenances” as applied to a piece of plate, consisting of several parts.*
- 17.—*Of the word “item.”*
- 18.—*Of funds “assigned or transferred,” at a given period.*
- 19.—*Of the effect of a bequest of sums “due from G. B. to the testatrix at the time of her death.”*
- 20.—*Of the effect of a bequest “subject to certain debts.”*
- 21.—*Of the effect of a residuary bequest of personal estate upon trust funds impressed with the character of real estate.*
- 22.—*Of the effect of bequest of residue between three, deducting out of the share of one a debt due to testatrix from legatee.*
- 23.—*Of residuary bequest not an execution of a power.*
- 24.—*Of the effect of the words “the principal to devolve eventually on a residuary legatee.”*
- 25.—*Of the meaning of the word “fortune,” in reference to various funds mentioned in will.*
- 26.—*Of the bequest of monies arising from sale of real estate.*
- 27.—*Of the construction of the words “begotten,” and “to be begotten.”*
- 28.—*Of legacy “to my beloved wife,” she having died and testator married again.*
- 29.—*Of the words “last mentioned children,” in reference to three classes of children previously mentioned.*
- 30.—*Of bequest of money “at the banker’s,” upon the whole will, a bequest of the residue.*

Joint-tenancy.31.—*Of the words “to be settled.”*32.—*Of the word “all.”*33.—*Of the word “now.”*34.—*Of the word “from” a given day.*35.—*Of the words “joint and natural lives.”*36.—*Of the expression “Holy orders.”*37.—*Of the words “to be disposed of in a due course of administration.”*38.—*Where words, strictly importing a future sense, upon the context, construed to include the past.*IV. Fourthly.—*Of the effect of recital.*

SECT. I. OF JOINT-TENANCY.

1. When legacies are given to two or more persons in *undivided shares*, as 100*l.* “to *A.* and *B.*,” or “to the children of *C.*,” or “to *A.* and her children” (*a*), she having children at the date of the will, or the death of the testator, the legatees will take as joint-tenants, there being no words of severance.

Thus, in *Webster v. Webster* (*b*), a testator bequeathed the residue of his personal estate to three persons; and the question was, whether they were joint-tenants, or tenants in common? Sir *Joseph Jekyll*, M. R. said, that the case being of great consequence, he would take time to consider of it; and he afterwards gave judgment, that the survivor should take the whole, and retain it in equity, in the same manner as if it had been a grant at law.

So, in *Cray v. Willis* (*c*), a testatrix bequeathed the surplus of her personal estate to her son *Samuel* and her daughter *Hannah*, making them executors. Upon the death of *Hannah*, the question was, whether, as this was a legatory matter, and suable in the Spiritual Court, where survivorship would not be allowed, the survivor should be liable to account with the representative of the deceased executor. Sir *Joseph Jekyll*, M. R. said, that a right of survivorship was as good as a right by descent; neither was there anything unreasonable or unequal in the law of joint-tenancy, each having an equal chance to survive; and the

(*a*) *Sutton v. Torre*, 6 Jur. 234; *De Witte v. De Witte*, 11 Sim. 41; *Bain v. Lescher*, Ib. 397, but if there were no children of *A.* living at the death of the testator, the above words

would have conferred an absolute interest in *A.* *Wylde's case*, 6 Rep. 17 b.; *Buffar v. Bradford*, 2 Atk. 220.

(*b*) 2 P. Wms. 347.

(*c*) Ib. 529.

duration of all lives being uncertain, if either party had an ill opinion of his own life, he might sever the joint-tenancy by a deed granting over a moiety in trust for himself; so that survivorship could be no hardship where either side might at pleasure prevent it. To the objection that in case of a legacy given to two persons it should not survive, because a legacy was recoverable in the Spiritual Court, where the rule of the Civil law took place, which rule was against survivorship, his Honor answered, that he did not see why a Court of Equity should, even in the case of a legacy, judge according to the Civil law, but ought rather to pursue the common law, which was the general law of the land; for all legatees were volunteers, and ought to stand or fall by the rules of the common law. That if these two joint residuary legatees should be taken as tenants in common, then, in the event of one of them dying in the life of the testator, one moiety of the personal estate would have gone to the testator's next of kin, according to the Statute of Distributions, which would hardly be admitted; and his Honor accordingly decided that the survivor took the whole (c).

In *Keys v. Luffkin* (d), *Joseph Waland* bequeathed as follows: "I give to my sisters *Mary* and *Sarah* the residue of my personal estate." *Mary Luffkin* survived her sister *Sarah*, the late wife of the plaintiff, and the question was, whether *Mary* was entitled to the whole of the residue of the testator's personal estate, she insisting that the bequest created a joint-tenancy; and Sir *Thomas Sewell*, M. R. decided that she was.

In *Campbell v. Campbell* (e), *Susannah Hodson* directed that the residue of the money to arise from the sale of her real and personal estate should be divided into three equal parts; and she gave one-third of it unto and amongst the child and children of her sister *Rose Campbell*, that should be living at the time of her death; one other third, unto the child or children of her niece *Elizabeth Lewington*, which should be living at the time of her decease; and the remaining third unto and amongst the children of her niece *Catherine Buticaz*, which should be living at the time of her death. The question was, whether the children of the then families, and particularly the four surviving children of the *Lewington* family, took their shares of the residue as joint-tenants, or tenants in common. With respect to the children of *Rose Campbell*, Lord *Alvanley*, M. R. said, that however the

(c) See *Bastard v. Stukely*; 243, pl. 2; 1 Vern. 482, S. C. Thomas Jones, Rep. 130; and Lady Shore v. Billingsly, 1 Eq. Ca. Abr. (d) 1 Dickens Rep. 392. (e) 4 Bro. C. C. 15.

Joint-tenancy.

Court might formerly lean to the construction of wills in favour of joint-tenancy, it had for many years past laid hold of words in favour of tenancy in common, and for that purpose it had laid hold of the words, *equally ; share and share alike ; to and between ;* that there was no difference between those words and "*to and amongst ;*" and he cited *Trundell v. Eames* (*f*), wherein the latter words were considered as words of severance; and his Lordship concluded, by observing, "I take the law, therefore to be, that where a legacy is given to two or more persons, whether they are made executors or not, that they are joint-tenants. Then the next question is, whether there is anything here to shew she meant to introduce words of severance. She has interposed words of severance in the two former cases, and has omitted to do it here. With respect to the *Lewingtons*, it is said she could not mean differently as to these children from what she did as to the others; but I cannot follow that reasoning: here are no words of severance. It is said that it is the blunder of the clerk; but it is more essential to the purpose of justice, that there should be fixed rules of construction, than that a Judge should form conjectures as to the intent of the testator. I am therefore of opinion, that the words are not, in this case, sufficient to sever the interests, but that it was a joint-tenancy, and has survived."

In *Morley v. Bird* (*g*), *William Collins* devised and bequeathed his real and personal estate to his daughter, *Elizabeth*, and added, "and every thing I die possessed of, I give all this to her only use and pleasure for ever, on condition that she pay to the four daughters of my brother, *John Collins*, 400*l.* out of 700*l.* now lying in the three *per cents.*" Three of the four daughters of *John Collins* died in the testator's lifetime, and after the testator's death, the surviving daughter, *Martha*, the wife of the plaintiff, filed the bill claiming the whole legacy of 400*l.*, and Lord *Alvanley*, M. R., observed, that the form of the legacy made no difference in that case, it being impossible to make the least distinction, between a legacy to one person upon condition to pay to four persons 400*l.*; and a legacy of 400*l.* to be paid to them by the executor; and he decided that, there being no words of severance, it was a joint legacy, and the whole interest survived and belonged to the plaintiffs.

So, in *Stuart v. Bruce* (*h*), *Charles Stuart* bequeathed thus:

(*f*) Before Lord *Bathurst*, 11th
Feb. 1773; Reg. Lib. fo. 608, b.

(*g*) 3 Ves. 629.

(*h*) Ib. 632.

“I do constitute and appoint my daughter and son, born of my servant, *Champy*, to be my sole heirs and executors to my estate, moveable and immoveable, after payment of all my just and lawful debts.” After the death of the son, an infant and intestate, the daughter filed her bill against the defendant, the executor, and the question was, whether the legatees were joint-tenants; and Lord *Loughborough*, C., held the bequest clearly joint; observing, that, as they were natural children, and could not succeed to each other, that circumstance was a strong inducement to leave it to them jointly, if the testator had consulted how to leave it to them in the best way.

Again, in *Whitmore v. Trelawney* (i), *Owen Salisbury Brereton* bequeathed to his wife the interest of his three *per cent.* consols for life, (except, &c.), and after her death two-thirds of the interest of the consols to General *Trelawney* and his brother, *Thomas*, for their lives; and, after their deaths, to the two persons in possession of his real estates. *Thomas* survived the General, and, the widow of the testator being dead, the question was, whether *Thomas* was entitled to the whole of the two-thirds of the interest by survivorship. Lord *Eldon* said, that although it was exceedingly probable the testator did not mean survivorship, yet, as he had actually given in words creating a joint-tenancy, which was not severed, the whole must go to *Thomas*.

The general rule, upon which the preceding cases were decided, was further confirmed by the judgment of Sir *William Grant*, in *Jackson v. Jackson*, and by Lord *Eldon*, upon appeal from his Honor's decree, the principle of which his Lordship sanctioned, while he overruled the decision itself upon the particular circumstances, which amounted to a severance.

In the case of *Jackson v. Jackson* (k), *Paul Jackson* devised and bequeathed all the residue of his real and personal estate whatsoever, (subject to the payment of an annuity to his wife, and the interest of two legacies to his daughters during the life of his wife), to trustees, upon trust to permit his two sons, *William Jackson* and *Collingwood Forster Jackson*, to enter upon and occupy his real estates, and also his leasehold estates, and into the several branches of his trading business, and jointly to manage and carry on the same, under the directions of the trustees, to the best advantage during the life of his wife; and, after her decease, upon trust, out of the rents and profits of a

(i) 6 Ves. 180.

(k) 7 Ves. 535.

Joint-tenancy.

certain messuage before devised, the proceeds of his trade, and by sale or conversion of his personal estate, to satisfy the legacies to his daughters: and the testator directed, that in case his wife survived him more than twelve months, his son should not be compelled to pay more than 400*l.* during any one year, towards making up the payment of his daughters' legacies; and, after full payment of the two legacies to his daughters, and all interest, the testator directed all the residue and remainder of the said trust estates to go and be *unto and for the only use and benefit of his said two sons, William Jackson and Collingwood Forster Jackson, and the survivor of them, their or his heirs, executors, administrators, and assigns for ever*, according to the several and respective natures and tenures of such estates; and to and for no other use, intent, and purpose whatsoever; to take and hold his said *real* estates and every part thereof, in case his said two sons should survive him, as *tenants in common, and not as joint-tenants*; and he appointed the trustees executors. After the death of the testator, the two sons carried on the business till the death of *William Jackson*, one of the sons; the testator's widow being then dead, *Mary Jackson*, the widow and sole executrix and residuary legatee of *William Jackson*, filed her bill against the surviving brother and the trustees, praying to be declared entitled to a moiety of the leasehold premises, stock and effects of the partnership carried on by *William Jackson* and his brother, and also of the residue of the personal estate. The defendant *C. F. Jackson*, the surviving brother, submitted that *William Jackson* did not take a vested interest in the premises, but, that if he did, he took the same as joint-tenant with him, the defendant, and that nothing was done to sever the joint-tenancy. Sir *W. Grant*, M. R., decided, that, upon the words of the residuary disposition, there was a joint-tenancy as to the *personal* estate, and he did not see any clear intention for a tenancy in common, observing, "I have nothing to go upon in putting any other construction upon the words than that, which is their legal effect. It is true, as it was argued, this may be somewhat of an absurd disposition; giving part of his estate between his sons as *tenants in common*, and the residue between them as joint-tenants. As to that, I can only say, in the one case it is rational to construe him to have meant, that they should take the profits, as they accrued; and there is a circumstance, from which it evidently appears, such was the intention." His Honor decreed that the profits accrued before the wife's death, were divisible between the sons, and be-

longed to them as received in their several rights; but the residue belonged to the survivor. It would be just the same, if the word "survivor" was not used; the words being those of joint-tenancy. Upon an appeal (l) before Lord *Eldon*, against the decree of the Master of the Rolls, it was urged on behalf of the plaintiff, that if it were a joint-tenancy under the will, it became a tenancy in common by the manner in which the brothers carried on the business; and that it was not competent for one of those partners, now as between themselves, to say he was mistaken. After an elaborate consideration of the circumstances of the case, the Lord Chancellor, without contradicting the ground taken by the Master of the Rolls, was of opinion, that under all the circumstances of the case, the two sons of the testator were to be considered as tenants in common of his property embarked in trade, from the time they were left in possession, including as well the capital as the profits. In the course of his observations his Lordship said, that it was extremely clear, that, unless there were specialties in the will, the residuary clause passed the property to the brothers as *joint-tenants*; and, attending both to the words of the residuary clause, and all the passages in the will, having relation to equal division or survivorship in the various events, he (Lord *Eldon*) was not satisfied that he could hold upon the will itself, and independent of the nature of the property and the dealings of the parties, that it was a tenancy in common (m).

In *Crooke v. De Vandes* (n), *John Crosse* bequeathed the residue of his personal estate to be invested on security, and, subject to an annuity to his daughter *Sarah*, gave all the remainder of the interest "*to be equally divided, and paid yearly to my two grandsons or their children for life, &c.*;" and, after a void bequest of a part of the residue, added, "*what remains to go to my grandsons.*" One of the questions was, whether the grandsons took the residue as tenants in common, or joint-tenants; and it was contended in favour of the former construction, that as they took the interest as tenants in common, by the express words of the will, it would be strange to suppose the testator meant them to take the principal in a different manner. But Lord *Eldon* decided otherwise, declaring that where words had once got a clear settled legal meaning, it was very dangerous to conjecture against that meaning upon no better foundation, that it was

(l) 9 Ves. 591.

(n) 9 Ves. 197.

(m) See *Saunders v. Lowe*, 2 Black. 1014.

Joint-tenancy. improbable the testator could have meant to do one thing by one set of words, having done another thing by another set of words.

Again, in *Swaine v. Burton* (o), *Mary Cockell* devised all her leasehold, freehold, copyhold, and real estates whatsoever unto and to the use of trustees, their heirs, executors, and administrators, upon trust to sell, and with the money to pay off incumbrances, debts, and legacies, and, after payment thereof, to pay the rents and profits of the said estates, or so much as should not be sold, to the use of *Joseph Welsh* for life; and after his decease, the testatrix devised and bequeathed such part of her real estates and the produce thereof, as should not have been sold or applied for the purposes aforesaid, unto the heir or heirs-at-law of her cousin *William Cockell*, and the heirs, executors, and administrators of such heir or heirs-at-law; and she directed the trustees to convey and assign the same accordingly. Lord *Eldon* decided that the devise and bequest created a joint-tenancy, and he dismissed the bill of the son and heir-at-law of *Catherine Swaine*, who claimed one-fifth in her right, as one of the five co-heiresses of *William Cockell*, who were also co-heiresses of the testatrix (p).

In *Bridge v. Yates* (q), the testator gave one-fourth of the proceeds from the sale of his residuary estate to trustees in trust for his wife for life, and after her decease in trust for and to be equally divided amongst all his children who should be then living, and the issue of such of them as should be then dead, such issue taking only the part or share which his or her deceased parent would have been entitled to if living. Two children and two grandchildren, the children of a deceased daughter were living at the widow's death. Sir *L. Shadwell*, V. C., held that the grandchildren took their parents' share as tenants in common with the surviving children, but as between themselves, the testator not having directed any division, they took as joint-tenants (r).

Words of severance controlled.

In *Pearce v. Edmeades* (s), words of severance were controlled by other expressions in the will. There the testator bequeathed the interest of his residuary property to his two grandchildren during their respective lives *in equal shares*; and *after their decease* he directed the capital to all and every their children in

(o) 15 Ves. 355.

(p) See also *Morris v. Barrett*, 3 Yo. & Jer. 384.

(q) 12 Sim. 645.

(r) See also *Sutton v. Torre*, 6 Jur. 234; *Amies v. Skillern*, 14 Sim. 428;

Beales v. Crisford, 13 Sim. 592; *Wood v. Wood*, 3 Hare, 65; *Wilson v. Maddison*, 2 Yo. & Coll. (C.), 372.

(s) 3 Yo. & Coll. (E.), 246; see also *Malcolm v. Martin*, 3 Bro. C. C. 50.

equal shares. The Court of Exchequer held that the whole of the interest was payable to the surviving grandchild; the gift over to their children not being until after the decease of their parents, was inconsistent with the latter taking as tenants in common. Tenancy in common.

In *Crockett v. Crockett* (t), the bequest was of property to be at the disposal of the testator's wife for herself and children; and Sir J. Wigram, V. C., held that the bequest did not give to the widow a power of appointment, or make her and the children tenants in common, but created a joint-tenancy between them.

SECT. II. Of tenancy in common.

We proceed to consider what words of bequest have been construed to give the legatees interests as tenants in common; and it will be seen by the cases, that wherever a legacy is given to two or more persons by any expressions that import a severance, the legatees will be considered as tenants in common; for instance, where so much of a sum of money or residue is given to A., and so much to B. (u), or to them "*in equal shares*," or "*share and share alike*;" or where a distinct *share* of either of the legatees is referred to, or where the legacy is given to two or more "*to be equally divided amongst them*," or merely "*to be divided amongst them*," or to them "*jointly and equally*," or "*to and amongst them*," to them "*respectively*." We shall adduce instances of these in order; and—

1. *First*, where a legacy is given to two or more "*in equal shares, or share and share alike*," or where a distinct and separate share is pointed at. 1. In equal shares, share and share alike.

Thus, in *Rivers's* case (v), a testator bequeathed an *equal share* of his real estate (which shall be his due when the said estate shall be sold) to his two sons *James* and *Charles Rivers*: and Lord *Hardwicke*, C., determined, that the sons took as tenants in common; observing, "the words an *equal share* of my real estate must mean in equal shares, share and share alike, or it cannot be made sensible."

In *Heathe v. Heathe* (w), *William Madgewicke* devised lands after the decease of his wife to his cousin *William Madgewicke* in fee, upon condition that he paid, within six months after the death of the testator's wife, 400*l.* among all the children of his

(t) 1 Hare, 451; 5 Ib. 326.

(v) 1 Atk. 410.

(u) *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Belt's* ed. *supra*, p. 541.

(w) 2 Atk. 121.

Tenancy in
common.

When given in
equal shares,
share and share
alike, &c.

sister *Catherine Heathe*, share and share alike. The testator's wife *Averilla* having survived him, gave by will (among other things) all her personal estate *among* all the children *respectively* of her brother and sister *Heathe*. One of the daughters of *C. Heathe*, after surviving the testator and his wife, died intestate, to whom her father administered, and in her right claimed a share of *Averilla's* personal estate under her will, upon the ground that the children took as tenants in common. Mr. Justice *Parker* said, the question raised upon the first will, whether the words *share and share alike* make a tenancy in common, or a joint-tenancy, had been given up, and very right, for it had been held for two hundred years to be a tenancy in common: and upon the second will also, his Lordship decreed, that the words, "to and among respectively," gave a tenancy in common, and he thought that the word *respectively* would separate the estate.

In *Dodson v. Hay* (x), *Thomas Downes Wilmot* gave and bequeathed unto the children of his sister *Eleanor Dearn* the whole of his real and personal estate, after paying certain legacies, adding, "and it is my particular will and desire, that the children, all of them, be educated with the yearly interest of whatever portion of my estate that may fall to each *respective* child's lot or share, &c.:" and Lord *Alvanley*, M. R., decided that the words of the residuary bequest severed the joint-tenancy.

Again, in *Gant v. Lawrence* (y), *Richard Gant*, (the father, bequeathed all his personal estate unto his two sons *Richard* and *John Gant*, their executors, administrators, and assigns for ever; and the will contained a proviso that *John Gant*, during minority) should be maintained out of the produce of the personal estate; and in case he should be minded to be put out apprentice to any trade, that a competent sum should be raised out of his (testator's) effects, as an apprentice fee, for the use of his son *John*, "and in part of the share, of which he will become entitled in the surplus of my said effects." *Richard* the son survived his father and died in 1805, having by will bequeathed all his property to his mother, whom he appointed sole executrix, and *Lawrence* (the defendant) a trustee. On the bill of the plaintiff against *Lawrence* and *John Gant*, for an account of the personal estate of *Richard Gant* (the son), the question was, whether *John Gant* and *Richard Gant* (the son) were entitled, under their father's will, as joint-tenants or tenants in common; and *Macdonald*, C. B., decided, that the provision for apprenticing the younger son was quite inconsistent with joint-tenancy; that the apprentice fee for

(x) 3 Bro. C. C. 404.

(y) Wightw. 395.

the use of *John* was to be taken in part of the share to which he would become entitled; and the words "in part of the share," were alone quite decisive of the testator's intention, that it should be a tenancy in common (z). Tenancy in common.

2. In the next place, we adduce cases, wherein the words "equally" and "divided" are used; as where the bequest is to two or more legatees "*equally to be divided between them*," &c., "*to be divided amongst them*." 2. Equally to be divided.

In *Warner v. Hone* (a), the bequest was of leaseholds to *A.* for life, after her death to *B.* and her three sons "*equally amongst them*;" and it was held they took as tenants in common.

In *Owen v. Owen* (b), the testatrix bequeathed in the following words: "All the residue, &c., I give to my two nieces, *Mary* and *Elizabeth*, daughters to my nephew, *William Owen*, and *Ann* his wife, whom I desire to be trustees for their children to take care of their legacies for them, they being of tender age; and my will is, that my estate be *equally divided between* my two nieces, *Mary* and *Elizabeth*, whom I appoint my executrices accordingly." One of the nieces died in the life of the testatrix, and the question was, whether the surviving niece, or the testatrix's next of kin were entitled to the share intended for the deceased; which depended upon this, whether the nieces, if they had both survived the testatrix, would have taken as joint-tenants, or as tenants in common. Lord *Hardwicke*, C., decided, that the words *to be equally divided*, would have made the legatees tenants in common, and that the share of the niece who died, lapsed, and became the property of the testatrix's next of kin.

Again, in *Jolliffe v. East* (c), *Jane Jolliffe* bequeathed to *Eleanor* and *Sophia Jolliffe*, 10,000*l.* *to be equally divided* between them, when they should arrive at twenty-one, with interest from the testatrix's death, until they attained that age. *Sophia* died under twenty-one, intestate, and her father the defendant, *William Jolliffe*, administered to her, and claimed a moiety of the 10,000*l.* upon the principle, that the two legatees took as tenants in common. Lord *Thurlow*, C., without hearing the other side, decreed accordingly; observing, that if there were no words that

(z) See also *Jones v. Randall*, 1 Ja. & Wal. 100, *infra*; *Taniere v. Pearkes*, 2 Sim. & Stu. 383, *infra*.
 (a) 1 Eq. Ca. Abr. 292, pl. 10; see also *Williams v. Yates*, 1 C. P. Coop. Ca. Cha. 177.
 (b) 1 Atk. 494.
 (c) 3 Bro. C. C. 25.

Tenancy in
common.

Equally to be
divided.

would point at a tenancy in common, the rule of survivorship must take place, but that the words in the will were sufficient to create a tenancy in common.

In *Bolger v. Mackell* (d), Catherine Underhill gave the residue of her personal estate, after the decease of her mother, to the daughter of James Winter, and to the children of the testatrix's brothers, John and James Snowden, to be equally divided betwixt them, share and share alike; the shares of the sons, with the interest or accumulation, to be paid at twenty-one; and of the daughters at twenty-one or marriage, after deduction for what might be laid out for maintenance, &c. John Snowden died without issue; James also died, leaving two sons, George and John, both of whom died under twenty-one, intestate and without issue, leaving their grandfather, James Noble, their administrator and next of kin, who claimed their shares of the residue upon the principle, that the legatees of the residue took as tenants in common; and Lord Loughborough, C., being of that opinion, decreed accordingly.

In *Ackerman v. Burrows* (e), the testator, by a testamentary instrument, in the form of a letter to his mother and sisters, bequeathed as follows: "My son will naturally succeed to anything that may arise from our wrecked property, and should anything remain, after paying my debts, I could wish it to be divided amongst you." The testator had a mother and six sisters living at the date of his will, but his mother and one of his sisters died in his lifetime. The question was, whether the interests of those who died in the testator's lifetime, lapsed or survived to the surviving sisters: and Sir William Grant, M. R., decided that the word *you* meant those to whom the letter was addressed, namely, his mother and then living sisters; and that the bequest was a tenancy in common; and that, consequently, the shares of those who died in the testator's lifetime lapsed (f).

In *Stewart v. Garnett* (g), the bequest was "to several legatees (naming them) the sum of 1,000*l.* sterling, payable to each of them on their attaining the age of twenty-one; and in case of the death of either of them before that period, the legacy hereby bequeathed to be divided amongst the survivors. Sir L. Shadwell, V. C., held, that the legatees attaining twenty-one were entitled to

(d) 5 Ves. 510; see also *Bagwell v. Dry*, 1 P. Wms. 700, *supra*, p. 485.

(e) 3 Ves. & Bea. 54; see also *Bindon v. Suffolk*, *infra*, p. 1374;

Crooke v. De Vandes, 9 Ves. 197, *supra*, p. 1365.

(f) See also *Jenour v. Jenour*, 10 Ves. 569.

(g) 3 Sim. 398.

one sum only of 1,000*l.*; and not each of them to a separate legacy to that amount, as tenants in common. Tenancy in common.

In *Warrington v. Warrington* (*h*), the devise and bequest was of the residue of real and personal estate equally between *A.*, *B.*, *C.*, and *D.* his wife, their heirs and assigns. Sir *James Wigram*, V. C., held, that the devisees and legatees took one-fourth a piece, as tenants in common. It was contended that the property was only divisible into thirds, *C.* and *D.* his wife to take one, the gift being to husband and wife, and *Bricher v. Whatley* (*i*) was cited. Equally to be divided.

In *Norman v. Frazer* (*j*), the direction was that the fund should be distributed in seven equal shares unto seven legatees (naming them), and they were held to take as tenants in common.

3. Where the bequest is to two or more in “*joint and equal proportions*,” or to them “*jointly*,” the legatees will take as tenants in common; the terms *joint* or *jointly* not being considered to impart an interest in the nature of joint-tenancy, but to signify a gift to them altogether. 3. Jointly, in joint and equal shares.

Thus, in *Ettricke v. Ettricke* (*k*), *William Ettricke* gave the rents and profits of his freehold and leasehold estates at *S.*, subject to certain annual payments to *Taylor*, in trust for his six younger children, to be distributed among them *in joint and equal proportions*. Upon the death of one of the six children, without issue, and intestate, a question arose between his heir-at-law and personal representative, and the surviving children, whether the children took as joint-tenants or tenants in common: and Sir *Thomas Sewell*, M. R., was of opinion, that they took as tenants in common; and that the word “*joint*” did not give a joint interest, but was to be considered as if the testator had said to my children *altogether*.

In *Perkins v. Baynton* (*l*), *Frances Nott* gave by her will to *Stukeley Baynton* and *William Baynton* 1,500*l.* “*jointly and between them*.” *William*, being the survivor, insisted that he was entitled to the whole: but Lord *Thurlow* determined otherwise, and dismissed the petition of *William Baynton*. In this case, *William Baynton* had filed his bill in the lifetime of *Stukeley*, for Demand no severance of joint-tenancy.

(*h*) 2 Hare, 54; see also *Hammett v. Ledsam*, 9 Jur. 173; *Paine v. Wagner*, 12 Sim. 184.

(*i*) 1 Vern. 233.

(*j*) 3 Hare, 84; see also *Barber*

v. Barber, 3 Myl. & Cr. 688, 696.

(*k*) Ambl. 656.

(*l*) 1 Bro. C. C. 118; see *Lushington v. Sewell*, 1 Sim. 475; also *Warner v. Hone*, *supra*, p. 1369.

Tenancy in
common.

Jointly, in joint
and equal
shares.

his moiety of the legacy, and it was contended that that severed the joint-tenancy; but his Lordship said that he did not know that a demand would sever a joint-tenancy, and decided the question upon the general construction of the bequest.

4. To and
amongst.

4. Where the bequest is to two or more legatees "*to and amongst them.*"

In addition to the cases of *Campbell v. Campbell*, and *Heathe v. Heathe*, before stated (*m*), the case of *Trundell v. Eames* (*n*), is an instance. There *Joseph Lane* willed, that the sum of 500*L*. Bank annuities, subject to the life interest therein of his sister-in-law, *Hester*, should go *to and amongst* his cousin, *Sarah Millet*, widow, and her children, and it was decreed, that the legatees were tenants in common.

In *Casterton v. Sutherland* (*o*), *Thomas Fowler* devised freehold estates to his wife for life; after her decease, "*unto and amongst*" all and every the children of himself and wife, in such manner, &c. as she should appoint. The testator also empowered his wife to sell the estates, and invest the money, and receive the interest for her life; and after her death, both principal and interest to be paid and applied "*to and amongst*" their children, in such proportions as aforesaid. The wife made no appointment. Sir *William Grant*, M. R., was clearly of opinion, that it was a tenancy in common.

5. Respec-
tively.

5. A gift to two or more "*respectively*" would also, it should seem, be sufficient words of severance to create an interest in common.

Thus, in *Heathe v. Heathe*, before stated (*p*), where *Averilla Madgewicke* gave personal estate among all the children of her brother and sister *Heathe* "*respectively*;" Mr. Justice *Parker* said he thought the word *respectively* would separate the estate, and make a tenancy in common.

The word *respective* also occurred in the bequest in *Dodson v. Hay* before stated (*q*). There the expression was, "*each respective child's lot or share:*" but Lord *Alvanley* seems to have considered the word *share* as severing the interest.

(*m*) Page 1361, 1367.

(*n*) Cited in *Campbell v. Campbell*, 4 Bro. C. C. 17, before Lord *Bathurst*, Reg. Lib. 1772, fo. 608, b.

(*o*) 9 Ves. 445; see also *Burrough v. Philcox*, 5 Myl. & Cr. 72; *Alloway*

v. Alloway, 4 Dru. & W. 380; *Falkner v. Lord Wynford*, 9 Jur. 1006; *Richardson v. Richardson*, 9 Jur. 322.

(*p*) *Supra*, p. 1367.

(*q*) Page 1368.

6. It has recently been decided that in a bequest to two or more *when they attain twenty-one*, the legatees take as tenants in common; and upon this principle that it is contrary to a rule of law (*r*), that persons who are to take at different times can take as joint-tenants; to make them take as joint-tenants the property must vest at once.

6. Tenancy in common. *to her or more when they attain 21*

The above decision was made by Sir *L. Shadwell*, V. C., in the case of *Woodgate v. Unwin* (*rr*), in which the interest of 2,500*L* stock was bequeathed to *A.* for life, and after her decease the capital to her children when they arrived at the age of twenty-one years. This decision has justly been considered at variance with that of Lord *Thurlow*, C., in *Stratton v. Best* (*s*).

7. Cases have not unfrequently occurred, wherein the various words of severance before noticed, as creating a tenancy in common, have been accompanied with other expressions importing a benefit to surviving legatees. The Court of Chancery, in such cases, endeavouring to give effect to every word in the bequest, has limited the effect of these words of survivorship to different periods. To what period this survivorship relates depends not upon any technical words, but on the apparent intention of the testator, collected either from the particular dispositions, or the general context of the will (*t*). Accordingly, the survivorship has been restricted so as best to suit the apparent intent of the testator, and to prevent a lapse, in some cases, to the death of the testator; in others, to the death of a person taking a previous life interest; in others, it has been supported during the minority of the legatees; and in others, again, for even a longer period, namely, a dying without issue living at their decease. The above observations will be better understood by a classification of the principal cases. But the modern rule seems to be, that, in the absence of any indication of a contrary intention on the part of the testator, the survivorship will be confined to the period of division of the fund.

7. Words of survivorship, how construed.

A.—We proceed to adduce some instances wherein the Court has held the survivorship, mentioned in the bequest, as intended by the testator to be confined to *his own death*, in some instances where the gift is immediate, in others not. This construction has

A.—When confined to the death of testator, that being the period of distribution.

(*r*) Co. Litt. 188.

on Wills, 160, ed. 1844.

(*rr*) 4 Sim. 129.

(*t*) 19 Ves. 536.

(*s*) 2 Bro. C. 238; see 2 Jarm.

Tenancy in common.

Survivorship confined to death of testator.

1. When the period of distribution the death of testator.

been termed unnatural, and one not to be resorted to if any other can be found (*u*). In such cases, the legatees have been considered as tenants in common from that event: the benefit of survivorship continuing only during the testator's life.

1. *First*, where the period of *distribution* also was the death of the testator.

Thus, in *Bindon v. Suffolk* (*v*), the then late *Earl of Suffolk* bequeathed the sum of 2,000*l.* (due to him from the Crown) to his five grandchildren, share and share alike, equally to be divided between them; and if either of them died, then his share to go to *the survivors and survivor of them*. The question was, whether the grandchildren took as tenants in common, or joint-tenants? It was decided that they were tenants in common, by the force of the words "share and share alike;" and by the subsequent words it must be intended, if any of them died during the life of the testator; for, were it not for this clause, if any grandchild had died before the testator, his share would lapse: that for many purposes the will must relate to the time of making; that the words, "if any of my grandchildren die," could not be taken indefinitely, for all must die some time or other; and that to understand those words, as had been contended, namely, "if any of my grandchildren should die before the receipt of the money," was entirely *dehors*, as nothing in the will warranted that construction; so that it must be understood, "if any of the legatees should die in the testator's lifetime;" for by that construction every word would have effect.

This decree was reversed on appeal to the House of Lords, but not against the principle adopted and stated by Lord *Cowper*, which has been followed and approved in the cases next stated, but upon the particular circumstances of the case; which case Lord *Loughborough* stated, in *Brograve v. Winder* (*w*), to be inaccurately reported in *Peere Williams*; and his Lordship, from a note of his own, corrected the report as follows: "That sum (20,000*l.*) was given by the testator to his two brothers, *George* and *Henry*, and the four children of *Henry*, equally to be divided among them, share and share alike; and if either of them die, to the survivors or survivor of them. The sum was an old debt

(*u*) *Hawes v. Hawes*, 1 Ves. sen. 14; *Stones v. Heurtly*, Ib. 166, and *Russell v. Long*, 4 Ves. 554; *Brown v. Biggs*, 7 Ves. 286.

(*v*) 1 P. Wms. 96, and 4 Bro. P. C. 574.
(*w*) *Infra*.

from the Crown, secured upon the hearth-money revenue, which was taken away by statute. My note is, that the words related to the time when the debt should be paid from the circumstances of the case. That governed the determination of the House of Lords. It was an unproductive fund till payment, and could be of no use to any one. That was an event depending upon interest and solicitation, and was extremely retarded by the consideration of its going to representatives."

Tenancy in common.

Survivorship confined to death of testator.

In *Barker v. Giles* (x), the testator devised his lands to be sold for the payment of his debts and legacies, and directed the surplus money to be laid out in lands, to be settled to the use of his two nephews, *Jerome* and *Robert Barker*, and *the survivors and survivor of them, and their heirs and assigns, for ever, equally to be divided between them, share and share alike*. *Jerome* died in the lifetime of the testator, and then the testator died. The question was, what should become of *Jerome's* moiety, whether it should descend, as a lapsed devise to the testator's heir-at-law, or go to *Robert*, the surviving devisee. Lord *King* was of opinion, that the first part of the devise, being to two and the survivor, made them plainly joint-tenants for life, and that the subsequent words plainly imported a tenancy in common, so as to make them tenants in common of the inheritance; that by the death of one of the nephews in the lifetime of the testator, the survivor became entitled to the whole for life; and that one moiety of the inheritance lapsed by the death of the nephew in the testator's lifetime, and descended to the testator's heir-at-law, and the other moiety of the fee would go to the surviving nephew's heir. The decree was afterwards affirmed upon appeal to the Lords.

Again, in *Stringer v. Phillips* (y), a testator devised 100*l.* to five persons *equally to be divided between them and the survivors and survivor of them*; and if *A.*, one of them, died before marriage, her share to go over to another person. It was decreed that they took this 100*l.* as tenants in common, and that the words "and the survivors and survivor of them," to make them joint-tenants, would be a contradiction to the first words, whereby they were made tenants in common, and that they should be construed to extend only to such as were *survivors at the death of the testator*, and therefore inserted to prevent a lapse; and

(x) 2 P. Wms. 280, and 3 Bro. P. C. 104.

(y) 1 Eq. Ca. Ab. 292, pl. 11;

see also *Rogers v. Towsey*, 9 Jur. 575; Holt's Eq. Rep. 270; *Clarke v. Lubbock*, 1 Yo. & Coll. (C.), 492.

Tenancy in
common.

Survivorship
confined to
death of tes-
tator.

that this was the stronger, by the limitation of *A.*'s share upon a contingency; by which it was plain the testator did not intend her to be a joint-tenant with the rest; and as the devise was to all five, they must all take alike, and not *A.* to be a tenant in common, and the other four joint-tenants. ♦

So also, in *Trotter v. Williams* (z), a testator bequeathed thus: "I give and bequeath to *A.* 500*l.*, to *B.* 500*l.*;" and then gave 500*l.* a piece to five other persons; adding, "My will is, that if any to whom I have given any money-legacy *happen to die*, that then her legacy, and also the residue of my personal estate, shall go to such of them as shall be *then living*, equally to be divided between them all." All the legatees lived to twenty-one; and then one of them, having survived the testator, by will bequeathed her 500*l.* to the plaintiff, and died. The question was, whether the plaintiff, her legatee, was entitled to the 500*l.*, or it was divisible among the survivors by the will of the first testator? It was decided that the words, "shall go to *such of them as shall be then living*," must refer to a certain time, and that was, when the legacies became payable, which was at the *death of the testator*; so that the death of any of the legatees afterwards would not carry it to the survivors (a).

The case of *King v. Taylor* (b) also comes within the present class of cases. There, *Ann Reeves* bequeathed to her son, *John Charles Reeves*, when he had attained twenty-three, certain sums of stock; and to her daughter, *Ann King*, the wife of the plaintiff, other sums of stock; and she directed the sums of stock, (which amounted to 400*l.*), if her daughter's husband were living, to be transferred into the joint names of her daughter and two trustees: whom the testatrix appointed in trust with her daughter for the said 400*l.* stock and interest, to be managed for her benefit; and the testatrix concluded thus: "*Item*, I do will and ordain, that if either of my children should die, the surviving shall have what I left to the other." *Ann King* survived the testatrix; and, after her death, the bill was filed by her husband, claiming the remainder of the 400*l.* stock bequeathed to her, the trustees having previously sold part, and paid the money to *Ann King*, at the desire of herself and the plaintiff. *John Charles Reeves*, as having survived his sister, claimed her share under the will. Sir *William Grant*, M. R., decreed the husband entitled to the remainder of the sum bequeathed to

(z) Pre. Ch. 78.

(a) 2 Eq. Ca. Ab. 344, pl. 2, S. C.

(b) 5 Ves. 806.

Ann King, who became entitled to an absolute interest *at the death of the testatrix*; and his Honor expressed his opinion, that the case of *Trotter v. Williams* was in point; and he said, that to construe the words, "if either of my children should die," to mean, "whenever the death of either should happen," would be totally inconsistent with the rest of the will.

Tenancy in common.

Survivorship confined to death of testator.

2. We proceed to adduce the rest of the cases falling within the class now under discussion, and which differ from those already noticed, in the circumstance, that the time of *distribution* was *not* the death of the testator, but a subsequent period.

2. *Semble*, where period of distribution subsequent to testator's death.

Thus, in *Wilson v. Bayly* (c), *Mark Tew*, after bequeathing certain leasehold estates to trustees, upon trust for the benefit of his two sons, *Mark* and *John*, and their issue, bequeathed as follows: "*Item*, My will is, that in case both my said sons, *Mark* and *John*, shall happen to die unmarried, and that neither of them shall have any issue lawfully begotten, then my daughters, *Mary*, *Sarah*, and *Catherine*, and the survivors and survivor of them, and their assigns, be permitted to receive all the rents, issues, and profits of all the said leases, lands, and premises, as tenants in common, and not as joint-tenants. The sons and daughters survived the testator. Afterward, *Mark* died unmarried, and *John* died leaving a wife, but no issue. *Mary* and *Sarah* died in their brother *John*'s lifetime. *Catherine* married *Thomas Bayley*, and survived all her brothers and sisters, and claimed to be entitled, as such survivor, to the whole of the estates, to the exclusion of the representatives of her deceased sisters; and the Lord Chancellor in *Ireland* so decreed. Upon appeal from this judgment, it was insisted, on behalf of the representatives of the deceased sisters, that *Mary*, *Sarah*, and *Catherine*, had such a contingent interest in them upon their father's death, as was transmissible to their assigns or representatives: and it was adjudged accordingly, that upon the contingencies that had happened, the estates were well devised to the testator's daughters, *Mary*, *Sarah*, and *Catherine*, as tenants in common.

In *Roebuck v. Dean* (d), a testatrix gave 1,000*l.* stock to trustees, upon trust to pay the dividends to her niece for life, and after her death, that the 1,000*l.* stock should be *equally divided* among the brother and four sisters of the testatrix, "and in like manner among the survivors or survivor of them." The niece was residuary legatee. One of the persons, to whom the

(c) 5 Bro. P. C. 388; 3 Toml. ed. 195.

(d) 2 Ves. jun. 265.

Tenancy in
common.

Survivorship
confined to
death of tes-
tator.

stock was given over, died in the life of the testatrix; two only survived the niece; and the question was, whether the representatives of such as died *in the lifetime of the niece*, were entitled; or whether the two plaintiffs, who survived the niece, had the exclusive right. Lord *Loughborough*, C., observed, that the words, "equally to be divided," created a tenancy in common, whatever might be the meaning of the word "*survivors*;" and, addressing himself to the case of *Bindon v. Suffolk*, stated in a preceding page, his Lordship said, Lord *Cowper's* conjecture upon the word, "*survivors*," was reasonable, and tallied with the fact in the case before him; for one of the sisters died in the lifetime of the testatrix, and, but for these words, that share would have lapsed: and his Lordship decided, that the division ought to be between the representatives of those who died, and the survivors.

Again, in *Perry v. Woods (e)*, *Jeremiah Gardiner* bequeathed 1,500*l.* Old *South Sea* annuities to trustees, upon trust to pay the interest and dividends to *Ann Darby* for life; and after her decease to and among her child and children, to be applied towards their maintenance and education, and the principal to be paid at twenty-one; but in case *Ann Darby* should die, and leave no child or children, he directed his executors to pay the principal unto his cousins *William* and *John Pricklow*, *share and share alike, or to the survivor* of them. He gave the residue to *J. Coltman*. *William* and *John Pricklow*, having survived the testator, died in the life of *Ann Darby*, who afterwards died without issue. *John* survived *William*; and the executors of *John* filed their bill, claiming, upon the death of *Ann Darby* without issue, the 1,500*l.* *South Sea* annuities, either exclusively or with *Aaron Darby* the administrator of *William Pricklow*, in moieties. The executor of the residuary legatee claimed the fund, as having fallen into the residue. Lord *Alvanley*, M. R., after citing, among other cases, *Stringer v. Phillips (f)*, which he said was literally in point, decided that the interest vested in *William* and *John Pricklow*, as tenants in common, and upon the death of *Ann Darby*, became divisible in moieties between their representatives.

Upon the two preceding authorities of *Roebuck v. Dean*, and *Perry v. Woods*, Sir *John Leach*, V. C., in *Cripps v. Wolcott (g)*, remarks, that they do not square with the other authorities. The former, however, is cited with commendation, and stated as an

(e) 3 Ves. 206.

(f) *Supra*, p. 1375.

(g) 4 Madd. 15.

authority by Sir *William Grant*, in *Hallifax v. Wilson* (h), and the latter is also cited by the same learned Judge, and approved, with reference to its being consistent with the intention of the testator (i).

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tator's death.

In *Maberly v. Strode* (j), *Samuel Strode* devised all his real and personal estate (except so much of the latter as was specifically bequeathed) to his executors and trustees, upon trust to sell, and place the money at interest, and pay such interest to his son *Samuel Strode* for life; and after his decease to transfer the principal to all the children of his son in equal proportions, or if but one, to such only child; if a son or sons at twenty-one, if a daughter or daughters at twenty-one or marriage, the interest in the meantime to be applied for their maintenance, &c.; but in case his son should die unmarried and without issue, or, having such, they should die being sons before twenty-one, or if daughters before that age or marriage, then in trust to assign the principal of such funds unto his nephews *William* and *James Strode*, and to his niece *Cecil Strode*, in equal proportions, *share and share alike*; his, her and their issue, or the issue of either of them, to take their parents' share; with *benefit of survivorship* to his said nephews and niece. The testator died, leaving his only child *Samuel*, and his nephews and niece surviving. *Samuel*, the son, afterwards married; then *Cecil Strode* died unmarried; afterwards *James Strode* died, leaving a widow and five children; some years after his death *Samuel* the son died, never having had any issue, but leaving a widow surviving. The questions were, *first*, whether the limitation over was good, the testator's son not having died unmarried; and *secondly*, if the limitation over were good, whether the words of survivorship applied to the death of the testator, or of his son? Lord *Alvanley*, M. R., being of opinion that the limitation over had taken place, upon the second point, after citing the cases before stated in this division of the subject, said that upon the blind words (with benefit of survivorship), the safest and soundest construction, best warranted by the authorities, most beneficial to the parties, most likely to be that intended, was, that the meaning was, *such as shall survive the testator*; that it was not meant, that it should remain in contingency, and vest only in such as should happen to survive the son, with the chance of the whole being lost and a total intestacy occasioned.

(h) 16 Ves. 171.

(j) 3 Ves. 450.

(i) *Newton v. Ayscough*, 19 Ves.

537.

Tenancy in
common.

Survivorship
confined to tes-
tator's death.

Again, in *Russell v. Long* (k), *George Garden*, by will, directed his trustees to pay the interest of the residue of his personal estate, and of the monies arising from the sale of the residue of his real estate, unto his mother *Ann Garden* for life: and after her decease to pay the principal and interest unto his three sisters *Christiana*, *Isabel*, and *Elizabeth Garden*, and *the survivors and survivor of them*, during their lives, into the proper hands of his said sisters, and *the survivors and survivor of them*, share and share alike; or otherwise to permit them and the *survivors and the survivor* of them to receive the same, in equal parts, for her and their separate use and benefit, the *survivors or survivor* or their or her heirs for ever; and he appointed his trustees executors. The testator's mother and sisters survived him; and then his mother died; and about two months after her, *Christiana*; whose executors filed a bill claiming one-third of the residuary estate of the testator, *George Garden*. Lord *Alvanley*, principally upon the authority of *Stringer v. Phillips* before stated, decided that upon the death of *Christiana Garden*, her third part of the testator's property passed by her will; observing that there were but two æras to which the survivorship could be referred. If all the sisters had not survived their mother, possibly he might have adopted the construction, that it related to the death of the mother, and not of the testator, for he thought that construction was not to be adopted, if any other could.

The last case to be adduced under the present class is *Brown v. Bigg* (l). There *John Bigg* bequeathed the interest of the residue of his personal estate to his wife for life, unless she married again; and after her decease or second marriage, he gave the whole of his personal estate, principal and interest, to his nephews and nieces after mentioned; viz. *Elizabeth Bigg*, *Bateman Bigg*, *Sophia Bigg*, and the four children of his nephew *John Bigg* by *Sarah* his wife, to be divided amongst them and *the survivors* of them, share and share alike; and he appointed his wife *Ann* sole executrix. The widow did not marry again. The four children of *John Bigg* by his wife *Sarah*, with the other legatees, were all living at the death of the testator; and *Elizabeth* was the only one of the legatees who died in the lifetime of the testator's widow. One of the questions was, whether any interest vested in *Elizabeth*, the other residuary legatees claiming the whole, as being the survivors at the death of the widow?

(k) 4 Ves. 551; see also *Belk v. Slack*, 1 Keen, 238.

(l) 7 Ves. 279.

Sir *William Grant*, M. R., decreed the representatives of *Elizabeth* entitled to her share of the residue of the testator's personal estate; and the trust of the funds was declared in seven shares accordingly. In the course of the argument, Sir *William Grant* observed, that the general leaning of the Court was against construing the words of survivorship to relate to the *death of the testator*, if any other period could be fixed upon; the testator generally supposing the legatee will survive him. If he intended his wife to have the whole for life, the probable conclusion was, that he meant the time of division (*m*).

Tenancy in common.

Survivorship confined to testator's death.

We may here notice the cases of *Brograve v. Winder* (*n*), and *Hoghton v. Whitgreave* (*o*), which might on the first impression seem to militate against the preceding class of cases in the construction of the words "*survivors or survivor*;" but form exceptions to them, and will appear upon consideration to have been decided upon their own particular circumstances.

Exceptions, *Brograve v. Winder*, and *Hoghton v. Whitgreave*.

In *Brograve v. Winder*, *Robert Moxon* devised his freehold and copyhold lands to his nephew *J. Moxon*, for life, and to his sons successively in tail male, with remainder to trustees to sell; and directed that the money to arise from the sale should be equally distributed among the three sons and daughter of his late niece, *Ann Winder*, "*or the survivors or survivor of them*." *Joseph*, the younger son of *Ann Winder*, survived the testator, but died in the lifetime of *J. Moxon*, who survived him a few days, dying without issue. One of the questions was, whether the death of the testator, or of *J. Moxon*, was the point of time at which the interests vested? which depended upon the consideration, to which of these two periods the words *survivors or survivor* related? Lord *Loughborough* observing that it was a case of real estate to be converted at a given period, and, admitting that it was generally true, those words would not prevent the vesting at the death of the testator, said, in concluding his judgment, "in this will, the penning of which is very particular, when once you fix his intention that they shall take it in money, which is clearly the sense of this will, there is no gift till the distribution. The object of the distribution is pointed out to be among persons named, or the survivors or survivor. That excludes

(*m*) See the case of *Doe v. Prigg*, 8 Barn. & Cress. 231, a case of real estate, and the authorities there cited; *Turner v. Capel*, 9 Sim. 158.

(*n*) 2 Ves. jun. 634.

(*o*) 1 Jac. & Wal. 146; see *Newton v. Ayscough*, 19 Ves. 534, *infra*, p. 1385.

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the possibility of taking in, as objects of the distribution, persons who are dead.

The case of *Hoghton v. Whitgreave* closely resembles the preceding case of *Brograve v. Winder*, and was similarly determined. There *Randall Underhill* gave the residue of his personal estate and all his real estate to his wife *Isabel* for life; and, after her decease, he gave the same to the defendant and another in trust to sell, and convert into money the real estate: and directed that the money arising from the sale of his real estates, and the rents and profits after the death of his wife until sale, as also the residue of his personal estate, be paid, and equally divided, share and share alike, amongst his and his wife's nephews and nieces aftermentioned, and the "*survivors or survivor of them*," (naming them, in all twelve persons), adding "and I do hereby give and bequeath the same to them and to the survivors or survivor of them, after the decease of my said wife, in manner aforesaid." Two of the residuary legatees died in the testator's lifetime; four others died in the lifetime of the testator's widow, upon whose death the real estate was sold. Upon a bill filed by *Catherine Hoghton* and four others of the residuary legatees, the question was, whether the legatees, who survived the testator, but died in the lifetime of the widow, took vested interests, which depended upon the construction of the words "*survivors or survivor*," as in the preceding case. Sir *Thomas Plumer*, M. R., decided in the negative. He strongly observed, that the subject-matter was not to be converted until the death of the tenant for life, and that it was then, and not till then, given to the trustees; so that there was not only no bequest until the widow's death, but the subject-matter did not, till then, exist in the form in which it was given: and his Honor said, that the case seemed to fall under the general rule, that legacies, given to a class of persons, vest in those who are capable of taking at the time of distribution (*p*).

B.—Where
words of sur-
vivorship con-
fined to death
of tenant for
life.

B.—We now proceed to that class of cases, wherein the survivorship has been confined to the *death of the tenant for life*: in all of which, that event was the period of division of the fund.

Thus in *Daniell v. Daniell* (*q*), *William Mantell*, in exercise of a power in his marriage settlement, gave the whole of his

(*p*) See also *Wordsworth v. Wood*, 4 Myl. & C. 641, affirmed, D. P. 20th May, 1847.

(*q*) 6 Ves. 297.

stock, of which he had thereby a power to dispose, to his trustees, upon trust, after the decease of his wife, to pay the interest of 1,000*l.* part thereof to his sister, *Jane Daniell*, for life; and after her death the principal to her two sons, *James* and *Francis Daniell*, share and share alike, absolutely, in case they should be living at their mother's decease; but if either of them should die in his mother's lifetime, the whole of the sum of 1,000*l.*, was to be paid to the survivor absolutely. In a subsequent part of his will, the testator, after reciting that he was possessed of 2,100*l.* Bank stock four *per cents.* gave the same to his trustees, upon trust, after the decease of his wife *Mary*, without leaving any child by him, to pay the interest of 1,000*l.*, part thereof to the said *Jane Daniell* for life; and after her decease, the said 1,000*l.* "to be paid *equally* between her said two sons, *James* and *Francis*, or the whole to the survivor of them." The testator's widow afterwards married *Thomas Colby*, one of the trustees. *Jane Daniell* survived the testator, but died in *Mary Colby's* lifetime. *Francis Daniell* died intestate after his mother, *Jane Daniell*, leaving his widow *Anne Daniell*, surviving. Upon the bill of *James Daniell* and the executor of *Mary Colby*, who died without having any child by the testator, against the representatives of the surviving trustee of the will of the testator and *Anne Daniell*, for a transfer of the 1,000*l.*, part of the 2,100*l.* stock, the question was, whether *Anne Daniell*, as administratrix of her husband *Francis*, was not entitled to a moiety of that sum; which depended upon the construction to be given to the words, "*or the whole to the survivor*," as to what period it related. Sir *William Grant*, M. R., was of opinion that by these words the testator clearly meant the survivor at the time of the *division*, which he did not think would take place till both his wife and Mrs. *Daniell* were dead; and that he conceived the deaths would happen in the order of the limitations. His Honor also remarked, that the mode, in which the testator disposed of the other sum, confirmed that construction, shewing that the period of division was the period at which he intended it to vest: and he accordingly decreed that the whole sum of 1,000*l.* should be transferred to the plaintiff *James Daniell*.

Tenancy in common.

Survivorship confined to death of tenant for life.

Jenour v. Jenour (r), a case of considerable doubt and difficulty, comes next in the present class. There *Mathew Jenour* first bequeathed in trust to three trustees 600*l.* *per annum* of his Bank long annuities, of which his sister, *Margaret Jenour*, should have

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400*l. per annum* during her life; and his brother should have 200*l. per annum* during his life. *Secondly*, after authorizing the appointment of new trustees, the testator directed upon the decease of his sister, 200*l. per annum* of the annuities left to her during her life, should be equally divided between his two nephews, *Joshua* and *Mathew Jenour*, and three nieces, *Charlotte Jenour*, *Sidney Finch*, and *Jane Jenour*, and *the survivors of them*; he then bequeathed as follows; “and the other 200*l. per annum*, shall be my brother’s during his life, if he shall survive my sister; and, after his decease, shall be equally divided between my two nephews, *Joshua* and *Mathew Jenour*, and *go to the survivor* of them, in case his brother shall leave no lawful issue; if he shall, such issue shall be in place of their father with regard to the said annuities. Upon the decease of my brother, the 200*l. per annum* of the annuities left to him during his life, shall be equally divided between my two nephews and three nieces before named, *and the survivors of them*. The testator then declared, the interest of his nieces was for their separate use; and he added a clause, imposing upon them a condition not to alienate their shares of the 400*l. per annum*, upon breach of which, by either of his nieces, her forfeited share was to go to the surviving sisters and brothers during the life of the niece; and the testator added, “but if she shall leave lawful issue at her death, such issue from that time shall have their mother’s share of the said 400*l. per annum*, in the same manner as they would have had it, had not their mother forfeited the same during her life; for the lawful issue of my nephews or nieces shall be in place of their father or mother after their decease; and have their father or mother’s share of the said annuities.” *Thirdly*, the testator directed his nephew, *Joshua Jenour*, to apply 350*l.* annually, out of the income of the office of one of the fifteen coal meters of *London*, of which he held a lease, and which he left to his said nephew in trust, and lay out such annual sum in the purchase of Bank long annuities, until, with the produce thereof, the annual sum of 92*l.* long annuities should be purchased, and which should be invested in the names of his trustees, to pay 30*l. per annum* to each of his two nieces, *Charlotte* and *Jane Jenour*, during the life of the testator’s sister, and 16*l. per annum* during the life of his brother, if his sister and brother should survive the expiration of his coal meter’s lease: and the testator added, “after the decease of my sister and brother, the 92*l. per annum* Bank long annuities directed to be purchased, shall be annexed to the 200*l. per annum* given to my two nephews, in the second article

of my will, and go to them in the same manner." The testator appointed his brother *Thomas*, and his nephew *Joshua Jenour*, executors; and the latter residuary legatee. After the testator's death, the 92*l.* long annuities were purchased according to the directions of the will, and invested in the names of trustees. Afterwards, *Margaret Jenour* died; and then *Thomas Jenour*. *Mathew Jenour*, the testator's nephew, filed his bill, praying to be declared entitled to a moiety of the 92*l.* long annuities absolutely, and a transfer accordingly. Sir *William Grant*, M. R., determined that the nephews should take absolutely, if living at the death of the tenant for life; if then dead, leaving issue, then the issue were entitled in the father's place, and should take absolutely. The decree directed a transfer of the moiety of the 92*l.* *per annum* to the plaintiff, and of the dividends accrued since *Thomas Jenour's* death. Upon appeal from this judgment, by *Joshua*, he insisted that he and *Mathew* ought to have been declared entitled for their respective lives only, with benefit of survivorship to them and their issue, according to the will. Lord *Eldon*, C., premised, that his decision upon the 92*l.* *per annum* might go to intimate an opinion, not to decide as to the title to the 200*l.* *per annum* long annuities; to which by the will, the other fund was annexed; and, after observing upon the doubt attending the case, determined, that the construction, upon the whole, must be, that one nephew should take the whole, if one only be living at the decease of the testator's brother, except the deceased one left issue; in that case, the one surviving should take half: and his Lordship declared, that, whatever might have been the claim of the issue, the plaintiff, having survived the testator's brother and sister, was entitled to one moiety of the 92*l.* *per annum*. His Lordship also observed, that if the first part of the disposition, giving 200*l.* annuities of the 400*l.* annuities, which the testator's sister was to have for life, to his nephews and nieces and the survivors of them, had stopped there, the necessary construction would be a distribution among those, who, upon the decease of his sister, were living; and the legal interpretation would not create a benefit of survivorship among them; but under the words *equally divided*, they would take the absolute interest as tenants in common.

In *Newton v. Ayscough* (s), *Dangerfield Taylor* gave to *Sarah Acam* the interest of 300*l.* four *per cent.* consolidated annuities (which by codicil, he increased to 400*l.*) during her life; and

(s) 19 Ves. 534.

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after her decease, to be sold and divided among his residuary legatees, or the survivor of them, share and share alike; and he appointed *Elizabeth Thompson*, *Sarah Deacon*, and *Elizabeth Powell* (afterwards *Newton*) residuary legatees. *Sarah Acam* survived the testator, and *Elizabeth Powell*, as the survivor of the three residuary legatees, at the death of *Sarah Acam*, claimed the 400*l.* four *per cents.*; and Sir *William Grant*, M. R., decided that the intention appeared very clear to refer the survivorship to the death of the tenant for life, and not of the testator. His Honor distinguished the principal case from *Perry v. Woods* (t), and remarked, that in the case before him, there was direction to the trustees, at the death of the tenant for life, to sell the fund and divide the produce among the residuary legatees, or the survivor of them, share and share alike. That naturally pointed to the period of sale, as the period to ascertain who were the persons to take; and brought the case much nearer to *Brograve v. Winder* (u), than *Perry v. Woods*.

In *Browne v. Lord Kenyon* (v), *C. Whitley* bequeathed the sum of 1,000*l.* (to which she was entitled under a deed of settlement) to Lord *Kenyon* and two other trustees, upon trust to permit it to remain on its present, or to place it out on other, security; and to pay the interest to *Abigail Jones* for life, and after her death to *Elizabeth Chetwode* and her sister Mrs. *Davison* in equal shares, during their joint lives; and after the death of either, to pay the whole interest to the survivor; and after the decease of the survivor, to pay the principal to testatrix's cousin, Sir *John Chetwode*, Bart.; but if he were then dead, then to his two brothers in equal shares, or the whole to the survivor of them. The tenants for life, Sir *John Chetwode* and his two brothers, *Charles* and *Philip*, all survived the testatrix. Afterwards *Elizabeth Chetwode* died, then *Charles Chetwode* died intestate, leaving a widow (his administratrix) and one child, the wife of *William Rose*, one of the defendants. After the death of *Charles*, his brother *Philip* died, and by his will appointed *Ann Chetwode* universal legatee and sole executrix, who died and appointed the plaintiff her residuary legatee and executor. After the death of *Philip*, Sir *John Chetwode* died. *Abigail Jones* and *Elizabeth Chetwode* died in Mrs. *Davison*'s lifetime, who after the testatrix's death, married *Edward Mainwaring*, and survived all the legatees named. The plaintiff prayed to be entitled to the 1,000*l.* and

(t) *Supra*, p. 1378.

(u) *Ib.* 1381.

(v) 3 *Mad.* 410.

the interest thereon since Mrs. *Mainwaring's* death; and upon this claim the question arose, whether the brothers, *Charles* and *Philip Chetwode*, took each a vested interest in the legacy of 1,000*l.* as tenants in common; or whether the surviving brother took the whole; or whether the legacy lapsed by the death of both before the tenant for life? Sir *John Leach*, V. C., said the only question was upon the words "*or the whole to the survivor,*" to what period the survivorship was to be applied. His Honor was of opinion, that the meaning was, if one only survived the tenant for life, he should take the whole: that it was, in expression, a vested gift to the two as tenants in common, subject to be divested if one alone should survive the tenant for life; but which never was divested, as the event did not happen: and he decreed accordingly, that the money was divisible between the representatives of the two brothers.

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Survivorship confined to death of tenant for life.

The next case to be cited in the present class is *Cripps v. Walcott* (w). There *Deborah Saunder*, in exercise of a power, bequeathed to *John Walcott* and another, 540*l.* in trust to pay the interest to her husband *Arthur Saunder* for life, and after his decease, directed it should be divided between her two sons *Arthur Saunder* and *George Saunder*, and the plaintiff *Ann Cawley Cripps* her daughter, and the survivors or survivor of them, share and share alike; and she appointed *George Saunder* her executor. The testatrix died, leaving her husband and three children surviving. *Arthur Saunder*, the son, died in his father's lifetime; and afterwards *Arthur*, the husband, died, leaving *George Saunder* and the plaintiff *Ann Cawley Cripps* surviving: the latter claimed to be entitled to a moiety of the stock, in the purchase of which the 540*l.* had been invested. The question was to what period the survivorship related; to the death of the testatrix, or of the tenant for life; and Sir *John Leach*, V. C., decided that it was to be referred to the latter. His Honor stated his opinion on the general rule in the following words: "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy,

(w) 4 Mad. 11; upon this decision see 2 Myl. & K. 25; 4 Myl. & Cr. 645.

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then the period of division is the death of the testator (*x*), and the survivors at his death will take the whole legacy. This was the case of *Stringer v. Phillips* (*y*). But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivors at such death will take the whole legacy. This was the principle of the cited cases, *Russell v. Long* (*z*), *Daniell v. Daniell* (*a*), and *Jenour v. Jenour* (*b*). In *Bindon v. Suffolk* (*c*), the House of Lords found a special intent in the will, that the division should be suspended until the debts were recovered from the Crown; and they referred the survivorship to that period." His Honor then made the observation on the two cases of *Roebuck v. Dean*, and *Perry v. Woods* before noticed (*d*).

In the later case of *Pope v. Whitcombe* (*e*), the bequest was of the residue of testatrix's personal estate to trustees in trust for her brother *William Pope* for life, and after his death in trust for *William Pope* (the son of her said brother), *Arthur, Sarah, and Elizabeth Groombridge*, and *the survivors and survivor of them share and share alike*, to be paid or assigned to them respectively as they should attain twenty-one, with interest in the meantime, and until they should be entitled to receive their respective shares. *William Pope* the son, and *Elizabeth Groombridge* died in the lifetime of *William Pope* the tenant for life, upon whose death *Arthur* and *Sarah Groombridge* claimed to be entitled to the residue in equal moieties, they being the only survivors at the death of the tenant for life, and that being the period of division: Lord *Eldon*, C., decided accordingly.

In *Crowder v. Stone* (*f*), the testator bequeathed stock in trust for two legatees for life, and after the death of the survivor the stock to be sold and the produce divided between his nephew *John Lloyd*, and his four nieces *Mary Powell, Jane Greenwood, Ruth Matthews, and Catherine Mitchener*, share and share alike. But in case of the death of either of his nephew and nieces before

(*x*) This proposition, it should seem, must be limited to those cases where the period of division is by the will, made subsequent to the death of the testator; see division 2, of class A. in the present section, p. 338.

(*y*) *Supra*, p. 1375.

(*z*) *Supra*, p. 1380.

(*a*) *Ib.* 1382.

(*b*) *Ib.* 1383.

(*c*) *Ib.* 1374.

(*d*) *Ib.* 1377, 1378.

(*e*) 3 Russ. 124.

(*f*) *Ib.* 217; see also *Blewitt v. Roberts and others*, 2 Cr. & Ph. 274; *Da Costa v. Keir*, 3 Rus. 360; *Gibbs v. Tait*, 8 Sim. 132; *Wordsworth v. Wood*, 4 Myl. & Cr. 641; *Taylor v. Beverley*, 1 Col. 108; *Williams v. Tarrt*, 2 *Ib.* 85; *Turing v. Turing*, 10 Jur. 366; *Dorville v. Wolff*, 11 Jur. 160.

their respective shares should become due and payable to them by virtue of his will, then the share of him, her, or them so dying without issue as aforesaid, should go to and be equally divided between and amongst *the survivor and survivors of them* share and share alike. The survivor of the legatees for life died in 1823, at which time *Ruth Matthews* alone was alive. *Mary Powell* died in *July*, 1797, leaving an infant son who died without issue in 1799. *Catherine Mitchener* died in *August*, 1797, and *John Lloyd* in 1805, both leaving children who were living. *Jane Greenwood* died in 1802, without issue. Lord *Lyndhurst*, C., decided the three following points: *First*, that *Mary Powell* took nothing by the bequest, her issue dying before the period of distribution. *Secondly*, that *Jane Greenwood*, as she survived *Mary Powell* would become entitled to her proportion of *Mary Powell's* share, but that although her original share became divisible among the survivors, her *accrued* share did not. *Thirdly*, that the representatives of *Catherine Mitchener* were not entitled to any portion of the shares of *Mary Powell* and *Jane Greenwood*, as she did not survive the period when the events happened upon which their shares were to go over.

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Survivorship confined to death of tenant for life.

C.—We now proceed to cite cases wherein the survivorship has been confined to the minority of the legatees.

C.—Survivorship confined to the minority of the legatees.

Thus, in *Hawes v. Hawes* (g), *Andrew Hawes*, the plaintiff's grandfather, by will, reciting that he was a freeman of *London*, devised, *so soon after his decease as his children required*, his *customary* part (h) to his five children, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, *with benefit of survivorship*. He then gave his *testamentary part* to his four younger children, in the same words, with *like* benefit of survivorship. *H. Hawes*, the father of the plaintiff, afterwards devised his lands to a trustee and his heirs, in trust to pay debts by sale; and the residue unsold, or the whole, if the personal estate was sufficient for such payment, to his three children and their heirs, when he, she and

(g) 1 Ves. sen. 13.

(h) By the custom of London, if a freeman die, the surplus of his personal estate, after debts and funerals paid, is distributable, one-third to his wife, another third to his children, and the other third part he may dispose of by his will. Salk. 426.

If any child die before the father, under twenty-one, and unmarried, his share goes to the other children, 2 Vern. 559. An orphan, after twenty-one, may dispose of his orphanage part, though it be not received, but not before twenty-one, Pre. Ch. 537.

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tees.

they attained the age of twenty-one or marriage, equally to be divided between them, share and share alike, as tenants in common, and not as joint-tenants, *with benefit of survivorship*, and directed the rents and profits to be for their maintenance and education during minority. One of the three children died before twenty-one or marriage. Two questions arose, *first*, whether the words of these wills constituted a tenancy in common or joint-tenancy? *Secondly*, what should become of the deceased child's share? Lord *Hardwicke*, C., rejected the construction that the survivorship related to the death of the testator, but confined it to the children's dying before twenty-one or marriage. With respect to the will of the grandfather *Andrew Hawes*, his Lordship was of opinion, that the disposition of the *customary* part seemed a key to the will, where the testator could not mean a survivorship of *himself*; the words in the beginning showing that it must be after his death, and at such time as it should attach; *viz.* at the age of twenty-one, when the child might call for his share, and if afterwards any of the others died before the age of twenty-one or marriage, might be entitled to part of his share. The use of these words, therefore, excluded any other construction. That the word *like* in the bequest of his personal estate referred to the customary survivorship, and amounted to expressly saying, if any die before twenty-one or marriage, to go to the survivors. With respect to the second question, which arose on the will of *H. Hawes* the father, his Lordship thought the word *and* must be read *or*; *viz.* when he, she, *or* they attained twenty-one, or marriage: and that the share of the deceased child under age or marriage survived to the rest, and did not descend to his heir, nor was it contrary to a tenancy in common, for at the time limited, namely, their respective ages of twenty-one, they should be so, but not entitled to a conveyance before.

Again, in *Mendes v. Mendes* (i), *Alvaro Mendes* bequeathed to *Rachel Mendes*, his daughter, 6,000*l.*, and to *Catherine*, his other daughter, 5,000*l.*, to be paid at twenty-six, or days of marriage; but in case both or either of them died before their respective legacies became due, then the legacy or legacies of her or them so dying, together with the interest or increase thereof, should be equally divided between his two sons, the plaintiffs; and in case of the death of either of them, *to the survivor of them*; and the testator directed, that 600*l.* a year should be given to his wife, *Sarah*, out of his estate, for the maintenance

(i) 3 Atk. 619.

and education of the plaintiffs, and their sisters, whilst they continued with her and at her charge; and he gave the residue of his real and personal estate to the plaintiffs, to be equally divided between them; *and in case of either of the plaintiff's death, the whole residue to be enjoyed by the survivor*; and in case of both of the plaintiffs' deaths, without leaving issue, then the residue was to be divided in the following manner; *viz.* one part to his wife, and the other to his daughters, *Rachel* and *Catherine*, equally, and their issue; and for want of issue, to the survivor of them; and, if all his children should die unmarried, and without issue, then he gave one-half of the residue to his wife, one-fourth to his brother, *Anthony Mendes*, and in case of his death, to his children; and one-fourth in like manner to his brother, *James Mendes*, and his children; and made the defendants, *Anthony, James, and Lewes Mendes*, executors. After the appointment of the executors, these words were added: "Memorandum, the 600*l.* I have ordered should be allowed my wife for my children's maintenance, is to be regulated as follows, *viz.* 100*l.* *per annum* to be allowed by each girl, and 200*l.* *per annum* by each boy; and, in case of the death of any of my said children, the *inheritor* or *inheritors* are to pay their share or proportion, so that the said sum of 600*l.* may not prove deficient, to be put at the end of the will." The testator's two sons, soon after his death, filed their bill for an account of the personal estate, and to have it secured. The children of *Anthony* and *James Mendes* insisted upon the benefit of the contingent limitations in the testator's will, as to part of the residue. *Moses Mendes*, one of the testator's sons, having attained twenty-one, petitioned the Court, that one moiety of the residue might be assigned to him; and Lord *Hardwicke* decreed accordingly. The first difficulty arose upon the construction of the words, "and in case of either of their deaths, the whole to be enjoyed by the survivor." His Lordship was of opinion, that the words, upon the general meaning of the will, could not apply to the deaths of the children generally, or to their deaths without issue; and, in concluding his judgment, said, "I am of opinion, the words, 'if both my sons should die without leaving lawful issue,' mean a dying before twenty-one, with regard to them; and the subsequent words, 'if all my children should die unmarried, or without issue,' mean, as to the daughters dying before twenty-six, or marriage; but even if they had died before twenty-one, and had lawful issue, I should have been of opinion, it would not have gone over. This is the most reasonable construction;

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and as the sons have attained twenty-one, no contingency has happened with regard to them, and, therefore, the residue of the testator's real and personal estate vests absolutely in the two sons, as tenants in common; or otherwise, in case of their marriage, they can make no provision for a wife, or any issue of the marriage. This makes a consistent plan of the whole will, and it is very happy that the memorandum was at the bottom of it; for from thence it is clear he intended, if both his sons died before twenty-one, the residue should go over, not otherwise." His Lordship's reasons for this judgment were formed from a view of the whole will, wherein he conceived an intention apparent on the part of the testator, (a parent making a provision for his wife and infant children), to provide portions to be enjoyed by his children at a given period, when he considered they would require them, daughters at twenty-six, sons on attaining their full age: and that the fund provided was to go among those who should survive the prescribed period of distribution or enjoyment.

Again, in *The Earl of Salisbury v. Lambe* (j), the Earl of *Thanet*, by a codicil to his will, gave 30,000*l.* to his executors, in trust for the equal and separate use of his five daughters, *Catherine Lady Sands*, *Ann Countess of Salisbury*, *Margaret Lady Lovel*, *Mary Countess of Harrold*, and *Lady Isabella Tufton*, equally, and their respective children; being 6,000*l.* a piece for each of his said daughters and their children, to be placed out at interest, with the approbation of each of his daughters, as to their respective share. If any of his said daughters should die, then the 6,000*l.* given for the benefit of her and her children should be in trust for her daughters and younger sons, subject to such deceased daughter's appointment; and in default thereof, in trust for the daughters and younger sons, equally, and to the *survivors and survivor* of them: and in case there should be no such daughter or younger son, or all should die before twenty-one or marriage, then in trust that his daughter so dying should dispose of the 6,000*l.* and interest to such of her sisters and younger children, and in such proportions, as she should then judge would have most occasion for the same; and for want of appointment, then in trust for all the daughters and younger sons of her sisters who should be living at her death, to be divided equally among them. *Lady Salisbury* made her will, and appointed the 6,000*l.* among

(j) Amb. 383, and 1 Eden, 465.

her children in unequal proportions; which appointment was of no effect, as all her children died in her lifetime, though after having attained their respective ages of twenty-one. The plaintiff and defendant, *Strode*, claimed as representatives of two of the younger children of Lady *Salisbury*. Lord *Egmont* claimed as administrator to his wife, who was the survivor of the younger children. *Isabella Pawlet*, Mrs. *Southwell*, and Lady *Gower*, claimed as younger children of Lord *Thanet*, who survived Lady *Salisbury*. Lord Keeper *Henley*, in giving judgment, said, "I am of opinion, that the 6,000*l.* vested in Lady *Salisbury*'s children, upon their attaining twenty-one, so as to be transmissible to their representatives. This question has been settled over and over again, and entirely to my satisfaction. As to the words, *survivors and survivor of them*, they can only mean to give cross remainders to the children, before the devise over can take place."

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In *Hallifax v. Wilson* (k), *William Hodgson* gave the residue of his personal estate to trustees, upon trust to pay the interest, &c. to his mother *Rebecca Hodgson* for life, and, after her death, to pay and transfer the said monies unto and among his nephew and nieces *Barbara*, *Thomas*, and *Margaret Hodgson*, share and share alike; their shares, with the accumulating interest (if any), to be paid or transferred to them respectively at their *respective ages of twenty-one years*; and in case any of his nephew and nieces should happen to die before his or their share or shares should become *payable*, then he directed that the share or shares of him, her or them so dying should go or be paid to the *survivor or survivors* in equal shares; and if but one survivor, to such only survivor; and to be paid at such times as their original shares. In case of the death of all his said nephew and nieces before the said trust monies should become *payable* by virtue of his said will, then he gave the said trust monies to his two trustees absolutely, share and share alike. *Thomas Hodgson*, the nephew, survived the testator, and *attained twenty-one*, but died in the lifetime of the testator's mother, who died shortly after *Thomas*. *Margaret Hodgson* married, but died under twenty-one. *Barbara Hallifax* (late *Hodgson*), the testator's other niece, attained twenty-one in the lifetime of *Rebecca*, the testator's mother; and with her husband, filed her bill for a transfer and payment of the fund. The defendant *Wilson* as administrator of *Thomas Hodgson*, claimed his share as a vested

(k) 16 Ves. 168.

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tees.

interest in him at his age of twenty-one. The question was, whether, in order to attain a vested interest, it was necessary that a nephew or niece should only attain twenty-one; or that they should both attain that age, *and* survive the mother? Sir *William Grant* was of opinion, that the former was the true construction. In one sense, and with reference to the capacity of the persons to take, by the word "payable" the testator had declared that the age of twenty-one was the period at which the shares were to be payable; in another sense, with reference to the interest of the tenant for life, they could not be payable until her death: but that it was with the direction to pay at the age of twenty-one that the bequest over was immediately connected; and it was to that period of payment his Honor thought that the subsequent words were most naturally to be referred: and accordingly he declared, that the plaintiffs had no claim to the share of *Thomas Hodgson*, as he attained the age of twenty-one.

The case of *Bayard v. Smith* (1) may here be added. There *Andrew Moffatt* gave the residue of his personal estate to trustees, upon trust to pay the same, and the interest, to and amongst, and to be equally divided between, the child or children of his two daughters, *Elizabeth Mills* and *Martha Norris*, share and share alike; sons to be paid at their respective ages of twenty-one, daughters at twenty-one or marriage respectively, which should first happen; with a proviso, that if any child or children should die before his, her or their shares became payable, then the share or shares of any child or children so dying should accrue to the survivors or survivor equally between them, share and share alike, if more than one, to be payable or transferrable at such ages, &c. as their original shares: the issue of any child dying in the life of *Elizabeth Mills* and *Martha Norris* to stand in the place of their parents respectively; and in case the said daughters should die without issue, or, having such, such issue should die without issue in the lifetime of his said daughters, then in trust for the testator's brothers *James* and *Aaron Moffatt*, absolutely, in equal shares, as tenants in common. *Martha Norris*, after the death of her husband *Norris*, married *John Bayard*, by whom she had issue. *Elizabeth Mills* becoming a widow, married *Walter Hammond*; and there were issue of both marriages. *Hugh Moffatt Norris*, one of the children of *Martha*

(1) 14 Ves. 470; *vide supra*, p. 1394, and *Cromek v. Lumb*, 3 Yo. & Coll. (E.), 565.

Norris by her first marriage, attained twenty-one, and died, having bequeathed all his effects to his mother, *Martha Bayard*. Upon the bill of the surviving children of *Martha Bayard*, praying a declaration that the share of *Hugh Moffatt Norris* in the residue had survived to the plaintiffs, and the other grandchildren, subject to the contingencies of the will, and praying an apportionment accordingly, Sir *William Grant*, M. R. was of opinion, that the shares of the children among themselves vested at twenty-one with respect to sons, and at twenty-one or marriage with respect to daughters; that the survivorship provided for by the testator was in case any child died before that period; if a son before twenty-one, if a daughter before that age or marriage: and he decided accordingly, that the representatives of *Hugh Moffat Norris* stood in his place, and took such interest, absolute or defeasible, as he himself had in the funds. His Honor observed, that the Court was not called upon to decide upon the effect of the limitation over to the two brothers of the testator.

Tenancy in common.

Survivorship confined to the dying of a legatee without issue.

The reader is referred to the case of *Walker v. Main* (m), as a similar determination (n).

D.—In the next place, the case of *Shergold v. Boone* (o), is cited as an instance of survivorship being extended to the dying of a legatee without leaving issue. *When confined to dying without leaving issue.*

In that case, *Caleb Smith* gave his real and personal estate to trustees, to convert into money, and divide the money into six equal shares, four of which sixth parts he directed should be paid and divided unto and amongst all and every the children of *Sarah Shergold* deceased, who should be living at the time of his (the testator's) decease, (save and except *Samuel Shergold*, her eldest son), in equal shares and proportions; and in case any of the said children should happen to die without leaving issue lawfully begotten, then and in such case, the share and shares of him, her or them, so dying, should go to the survivors or survivor of them, (save and except the said *Samuel Shergold*), in equal shares and proportions; but in case they should leave lawful issue, lawfully begotten, such issue should be entitled to

(m) 1 Jac. & Walk. 1; see also *Morgan v. Williams*, 14 Law J., N. S. p. 449, stated *supra*, Chap. X. sect. III., p. 587.

(n) For a similar decision in the case of portions provided by deed,

see *Schenck v. Legh*, 5 Ves. 452; *Ib.* 9, 300; and see *Crozier v. Fisher*, 4 Russ. 398, a case of devise of real estate.

(o) 13 Ves. 370; see *Buckle v. Fawcett*, 4 Hare, 536.

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Exception :
Joint-tenancy,
notwithstand-
ing words of
severance.

regulating the duration, but not the persons who were to participate in it. That it was only conjecture that, because the annuity was for the lives of the survivors, therefore the survivors were to enjoy it. That it would be raising an inference against the express words; and that the Court could not make a construction contrary to the expressions of the first part, unless there were in it a necessary incompatibility with that which followed.

On comparing the bequest in the preceding case with that of *Armstrong v. Eldridge*, the reader will probably think that the reasoning of Sir *Thomas Plumer* is equally applicable to the bequest in the latter case; and it is submitted that the construction of Lord *Thurlow* is the most natural. It is more probable the testator intended survivorship among the children, the primary objects of his bounty, than that they should be excluded by the representatives of a deceased child, whom, if not strangers to him in the common acceptation of the term, it is probable he did not intend to benefit.

The reasoning, however of Sir *Thomas Plumer*, in the case of *Jones v. Randall*, accords with the construction given to the bequest in *Eales v. Earl of Cardigan* (u). In that case the testatrix gave to her servants *Samuel Eales* and *Charlotte* his wife an annuity of 200*l.* each for their lives and the life of the survivor. By a codicil reciting that she had given annuities to *S. Eales* and his wife, she charged her real and personal estate with the payment of them and other annuities. *Samuel Eales*, who survived the testatrix had died leaving his wife surviving; and the question arose whether the widow was entitled to an annuity of 400*l.* during her life, or whether the personal representatives of *Samuel Eales* were entitled to his annuity of 200*l.* during his widow's life. Sir *L. Shadwell* decided in favour of the latter; observing that it was manifest the testatrix intended to give two annuities, and she had pointed out the period of the duration of each of the annuities (namely) the joint lives of the annuitants and the life of the survivor.

SECT. III. Of the surviving of accruing shares.

Surviving of
accruing
shares.

When distinct legacies are given to three or more persons as *tenants in common*, with a bequest to the survivors upon the death of any of them within a given period; it is settled that, upon the death of two or more legatees, the *original* legacies only,

(u) 9 Sim. 384.

and not those which have accrued to them by survivorship, will survive; for such accrued shares having vested in the surviving legatees in *distinct proportions*, proper words are necessary to make those accrued shares also survive with the original shares: but the rule is otherwise where the legacies are not given *separately* and *distinctly* but as an *aggregate fund*, made divisible among a *class* of legatees, with benefit of survivorship among them.

Surviving of
accruing
shares.

1. First, where the legacies do *not* compose an *aggregate fund*.

1. When legacies distinct.

In *Rudge v. Barker (v)*, *Thomas Cole* bequeathed as follows: "I give unto my granddaughters *Elizabeth* and *Ann*, and to my grandson *Thomas*, 1,000*l.* a piece of my capital stock in the *East India* Company, and the interest thereof to them for their use; and if any dies, to the survivors or survivor, share and share alike; and my meaning is, that the interest shall be paid to their father, my son *Howard*, to be improved to their use. The grandson died an infant, by which his share survived to his two sisters; then one of the sisters died, and the question was, whether the share she took by survivorship upon her brother's death survived to the other sister, as well as her original legacy of 1,000*l.*, or whether that share should go to her father as her administrator? And *Sir Joseph Jekyll*, M. R. was of opinion that it did not survive, but went to her administrator. He thought that probably the testator's intention was that it should go among the grandchildren, but that he must decide upon the words of the will, according to which the limitation over related to the legacy only. Had they not been distinct legatees it might have been otherwise, but being entirely distinct, the case was the same as *Barnes v. Ballard* before Lord *King*, 1st of June 1727 (*w*); where it was decreed for the administrator; and he agreed with Lord *Holt's* opinion cited in *Woodward v. Glasbrook (x)*.

In *Barnes v. Ballard (y)*, the testator bequeathed to four children 500*l.* a piece, at eighteen or day of marriage, and in case any of the children died before eighteen or marriage, then to the survivors and survivor of such survivors; one of the children died a minor, and then its legacy survived to the three; another afterwards died a minor; and the question was, whether the share that came by survivorship to the last deceased minor should, upon the minor's death, survive again; and it was held it should not;

(v) Forr. 124.

(w) Next case.

(x) 2 Vern. 388.

(y) Stated in *Pain v. Benson*, 3 Atk. 79, *infra*, p. 1402.

Surviving of
accruing
shares.

When legacies
distinct.

it came before Lord *Hardwicke* in 1740, and this point was acquiesced in.

Again, in *Perkins v. Micklethwaite* (z), *Micklethwaite*, the father of the defendant, bequeathed 1,500*l.* to his youngest son *Joseph*, and 1,000*l.* to each of his two daughters, and directed that if any of his three younger children should die before twenty-one or marriage, the portion of him or her so dying should go to the survivors; and he gave his real estate to his eldest son, charged with the portions. One of the daughters died under twenty-one and before marriage; *Joseph* also died under twenty-one and unmarried, in the life of the testator. The question was, whether, upon the death of *Joseph*, the share of the deceased daughter which upon her death became vested in *Joseph*, survived with his portion. Lord *Harcourt* decreed that it should not, because the portion of the deceased daughter vested in *distinct shares* in the surviving children, and there were no words for creating a joint-tenancy of those shares.

So also in *Ex parte West* (a), the only question was upon the following clause in a will; "I leave to *A.*, *B.* and *C.*, sons of *Arthur Scaife*, 1,000*l.* each, the interest to be added to the principal yearly, until they shall respectively attain the age of twenty-one years; and in case any of them shall die before that age, then to the survivors." *A.* died, then *B.* both under twenty-one. The question was, whether that part of the share of *A.* which survived to *B.* upon the death of *A.* survived afterwards to *C.* upon the death of *B.*; or whether *B.*'s original share only survived. Lord *Thurlow* said it was impossible for him to determine that the survived part survived again, without contradicting Lord *Talbot*'s decision (b). The question was, whether the word *share* in the case cited, meant all that the party took under the will, and would take in the survived part, as well as the original share, and which he (Lord *Thurlow*) should think a very natural construction, but that the cases in point expressly determined otherwise. His Lordship further observed, that it struck him forcibly from the first, that the whole ought to survive, but he could not find any difference between the principal case and those cited; and he was unwilling, sitting in bankruptcy, to overturn a decision when he should not have an opportunity of reconsidering

(z) 1 P. Wms. 274.

(a) 1 Bro. C. C. 575; S. C. 1 P. Wms. 276, note.

(b) His Lordship here refers, it is presumed, to *Rudge v. Barker*, *supra*.

That decision is reported to have been by the Master of the Rolls, who then was Sir *Joseph Jekyll*. Lord *Talbot* was Chancellor.

his opinion. His Lordship, having observed that if the parties chose to come before him in a more solemn way, he would give it more consideration; a bill was accordingly filed, and the cause heard by the *Master of the Rolls*, who decreed that the share did *not* survive a second time.

Surviving of
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shares.

When legacies
distinct.

Again, in *Vandergucht v. Blake (c)*, *Martha Liney* bequeathed to her executors three long exchequer annuities of 20*l.* with the tallies, in trust to permit each of her three deaf and dumb children, *George*, *Elizabeth*, and *Martha*, to receive the yearly produce of one of the annuities; viz. *George*, the yearly produce of the annuity, No. 2,211, *Elizabeth* that of No. 4,478, and *Martha* that of No. 1,350, for their lives; and in case of the death of either of her said children leaving any child or children, then his or her annuity should be equally divided between such child or children, share and share alike; and upon further trust that, in case of the death of either of her said three children without issue, then the annuity of him or her so dying should go to the survivors or survivor of them equally, share and share alike; and upon further trust in case of the deaths of all her said three children without issue, then the said three exchequer annuities should be equally divided between her granddaughter, *E. Donac*, and such of the daughters of her daughter, *Mary*, except her eldest daughter, *Martha*, as should be living at the death of her three children without issue as aforesaid, share and share alike. The testatrix bequeathed the residue of her personal estate upon the same trusts. The three children survived the testatrix. *Elizabeth* died next without issue, and made the plaintiff her executor. *George* afterwards died intestate, leaving two children, *George* and *Martha*: *Martha* married *Phillips*, who took out administration to his father-in-law. *Martha*, the testatrix's daughter survived her brother and sister, upon whose behalf it was contended that upon *Elizabeth's* death her share survived in moieties to *George* and *Martha*; and that, upon the death of *George*, his original share went to his children, but that the moiety of *Elizabeth's* share survived to *Martha*. But Lord *Alvanley*, M. R., decided, that there was no survivorship of the accrued share; and declared that on the death of *Elizabeth* without issue, her annuity vested in *George* and *Martha* in equal shares, subject to the contingency of their dying without leaving issue; but it appearing by the report that *George* died leaving issue, the said share vested absolutely in them;

Surviving of
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shares.

When legacies
distinct.

and belonged in moieties to *Martha* and the administrator of *George* (d).

The above rule as to the non-surviving of accrued shares, has however been censured by later Chancellors, upon the ground that an adherence to it is generally found to disappoint the intention of testators; for which reason Lord *Hardwicke*, in the following case, endeavoured to make a distinction between that and the other authorities, and decided that the word *share* was sufficient to include *accruing* as well as *original* shares.

The case alluded to is *Pain v. Benson* (e). There, *Thomas Bellasis* bequeathed the residue of his personal estate (after the deaths of his father, *T. Bellasis*, and his mother, *Elizabeth*, to whom he gave the interest for their lives successively) to his brother and sisters, *Charles*, *Mary*, and *Elizabeth*, and the sisters of the testator's late wife, *Martha* and *Rebecca Pain*, to be equally divided among them, share and share alike; then the testator adds, "and in case of the death of my brother, or any of my sisters, or wife's sisters, before me or the survivor of my father and mother, I do appoint his, her or their *shares* to be divided among the survivors of them. *Charles* died in the testator's lifetime, but after the making of the will; *Mary* and *Elizabeth*, the testator's sisters, died in the lifetime of the testator's mother, who survived her husband, but was then dead. Upon the bill of *Martha* and *Rebecca Pain*, against the defendant, (consignee of the money arising from the testator's personal estate) for the residue, the question was, whether the whole *accumulated* share of the persons, who were dead, as well as the *original* fifth, should go to the survivors at the death of the survivor of the father and mother of the testator; and Lord *Hardwicke*, admitting the general rule as established by the preceding cases, but relying on the particular penning of the will, was of opinion, that not only the original, but the accrued shares survived. His Lordship laid great stress upon the word *shares*, by which he thought the testator meant not only the original, but also the accumulated share should go over; and observed, that he was the more inclined to that construction, because he much questioned, whether the determinations of former cases had not been contrary to the intention of the testator, though

(d) See also *Crowder v. Stone*, 3 Russ. 217, 223, *supra*, 1388; *Bright v. Rowe*, 3 Myl. & K. 316; *Eyre v. Marsden*, 2 Keen, 564; 4 Myl. &

Cr. 231; *Rickett v. Guillemard*, 12 Sim. 88.

(e) 3 Atk. 78.

consistent with the rules of law: and the decree accordingly was, that the whole residue should be paid to the plaintiffs.

Surviving of accruing shares.

Lord *Thurlow*, in *Ex parte West*, before stated, observes upon the above decision, "I cannot agree with him (meaning Lord *Hardwicke*) in considering that case an exception to the general rule, though I should perhaps, in his opinion, of the rule itself."

When an aggregate fund.

2. We proceed in the *second* branch of the present section, with those cases in which the legacies have been given to a *class* of objects, as an *aggregate fund*; with benefit of survivorship among them.

2. When an aggregate fund.

In *Rudge v. Barker*, before stated, Sir *Joseph Jekyll*, M. R., said, "that had the legacies in that case not been *distinct*, it might have been another question."

The case of *Worlidge v. Churchill* (*f*), confirms this *dictum*. There, *Edward Worlidge*, after bequeathing to *Mary Worlidge* an annuity of 150*l.* gave to the defendants, *Churchill* and others, all his real and personal estates, in trust to sell; and (after payment of his debts, and retention of a sufficient sum to purchase the annuity) to lay out *the surplus money* in government security in their names, in trust and for the benefit of *Rosalba Worlidge*, the plaintiff, *Edward Worlidge*, *William Worlidge*, and *John Worlidge*, to be equally divided among them, upon their attaining twenty-one; but if any of them happened to die before attaining such age, then such deceased child's share to go to the *survivors or survivor* of them, and he directed the trustees to apply the *interest of such trust money*, during their minority, for and towards their maintenance and education; but if the interest should be more than sufficient for such purpose, then he directed the trustees to lay out the same for the said children's *mutual* benefit; and in case all the said four children should happen to die before attaining twenty-one, and leave *Mary Worlidge* living, then he directed the trustees to pay her the interest of such trust money; and after the decease of all, he bequeathed the *trust money* to the children of his late uncle, *Stephen Landen*, &c., and made the trustees executors. *John*, one of the children, died in the life of the testator. *William* survived the testator, but afterwards died about the age of seventeen, intestate, and without issue; and the defendant, *Townshend*, was his personal representative. *Rosalba* died about three years after, an infant of about eighteen, but made a will, disposing of such

(*f*) 3 Bro. C. C. 465.

Surviving of
accruing
shares.

When an ag-
gregate fund.

estate and effects, of what nature, &c. as she became entitled to, in consequence of the death of her brother *John*, in the life of her father, and after the death of her brother *William*, by virtue of the will of *Edward Worlidge*, or otherwise howsoever, and also her estate and effects whatsoever, that she might be possessed of, or entitled to, and which she had a right to dispose of; and made the defendant, *Porter*, executor of such will. The plaintiff filed his bill against the executors for an account, and prayed, *inter alia*, that the representatives of *William* and *Rosalba*, might set forth their claims. *Townshend*, by his answer, submitted, that he was entitled, as the representative of *William*, to such share as his intestate would have been entitled to. The defendant, *Porter*, as executor of *Rosalba*, insisted that *John*, having died in the life of the testator, one-fourth part of the money arising from the sale of the testator's estates, to which *John* would have been entitled, had he survived the testator, and attained twenty-one, upon the death of the testator accrued to the plaintiff, and *Rosalba* and *William Worlidge*, and the interest therein became vested in them immediately; and that upon the death of *William* under twenty-one, his share also in the testator's estate vested immediately in the plaintiff and *Rosalba*, in equal proportions, and therefore claimed the same, subject to the trusts of her will. But *Buller*, J., (for the Lord Chancellor) decided otherwise, observing, in the conclusion of his judgment, "but the strong part of the present case is, the testator's intention to keep it as an *aggregate* fund. He has made use, in two different parts of the will, of the words *trust money*; that expression does not apply to the *share* of each child, but to the *whole fund* in the trustees' hands, and takes in the whole fund that is to be distributed under the will. The second place where he uses the expression, *trust money*, is in the gift over to the children of his uncle *Landen*; and though the expressions "the whole, or all," are not used, the words *trust money*, are tantamount to them. The plaintiff therefore is entitled to the whole fund; and all parties must have their costs paid out of it.

Again, in the case of *Barker v. Lea* (g), the bequest was to the testator's nephews and nieces living at his decease, on their respectively attaining the age of twenty-five in equal shares, and in case of the death of any of them leaving lawful issue, the

(g) 1 Turn. & Russ. 413; *Crowder v. Stone*, 3 Russ. 1388, *sup.* 1388; 565; *Eyre v. Marsden*, 4 Myl. & Cr. 231; *Sillick v. Booth*, 1 Yo. & Coll. (C.), 121, 126. *Slade v. Parr*, 1 Yo. & Coll. (C.)

children to have the same share as if the parent had been living at the testator's decease; with a direction, that his trustees should, in the meantime, apply the produce towards the maintenance of the legatees; and in case of the death of any of them unmarried and without issue, then the testator gave the part or share of him or her so dying without issue, unto the survivor and survivors of them share and share alike, and to be paid to them respectively at the same time along with their original shares. One of the nephews died unmarried and without issue, before he attained twenty-five; and afterwards one of the nieces died under twenty-five unmarried and without issue. The question was, whether that portion of the share of the nephew, which on his death survived to his niece, became vested in her, or whether the accruing, survived with the original share to the other residuary legatees. Sir *Thomas Plumer*, M. R., decided that the whole survived. The grounds of his Honor's opinion were, that the testator spoke of the residue as an aggregate fund, to remain entire until it were seen who were the persons entitled to it. If any child died under twenty-five, there was nothing which correctly speaking could be said to go from that child to the survivors; for in that event such child was not entitled to any interest in the fund, his attaining twenty-five being annexed to the substance of the gift. But that after attaining twenty-five, the child took a vested interest in his share; such share could not survive.

Surviving of
accruing
shares,

When an ag-
gregate fund.

SECT. IV. Of Bequests wherein “ or” was construed “ and;” and “ and” construed “ or.”

“ Or” con-
strued “ and;”
and “ and;”
“ or.”

It sometimes happens that a whole sentence in a will is rendered uncertain or unintelligible, from the circumstance of the testator's having used the disjunctive “ or,” when the copulative “ and” should have been inserted, *et sic e converso*, “ and” for “ or.” In order to effectuate the intention of the testator, and give validity to the bequest, the Court of Chancery has corrected the mistake; each case, of course, being governed by its peculiar circumstances, no general rule can be laid down upon the subject. We therefore adduce some cases in illustration of the preceding observation; and—

1. *First*, where “ or” hath been construed “ and.”

In *Richardson v. Spraag* (h), the testatrix bequeathed a legacy

(h) 1 P. Wms. 433.

Or construed
and.

“to such of her daughters *or* daughters’ children, as should be living at her son’s death.” Some of her daughters survived that period, who had also children, and others were dead, leaving children. The question was, whether the children of the living daughters should be let in to a share of this bequest, or the children of the deceased daughters only, as substituted in the place of their mothers; and it was decreed at the *Rolls*, that all the children, as well of the living as the deceased’s daughters, should participate in the legacy: Sir *Joseph Jekyll*, M. R., observing, that “*or*” should be taken for “*and*,” otherwise the whole devise would be void for the uncertainty; and that it was the same as if the bequest had been “to such of my daughters *and* their children as shall be living at my son’s death.” So if the devise had been “to my children *or* grandchildren,” my children *and* grandchildren would have taken.

Again, in *Eccard v. Brooke* (i), *Louisa Lafitte* bequeathed certain trust funds in trust for her son, *James Lafitte*, for life, and after his death without issue then living, (an event which happened), the testatrix directed the fund to be paid unto and among all and every the nephews and nieces that should be then living, as well on the side of her husband as her own, (to wit), “the said *Jane Blundy or* her children, and the said *Peter Brozet or* his children, and *David Lafitte or* his children, and *Peter Lafitte or* his children, and *Susannah Eccard or* her children, to be equally divided between them, share and share alike.” *Peter Brozet*, *David Lafitte*, and *Peter Lafitte*, died without issue in the lifetime of *James*; at whose death *Jane Blundy* was living, having married *George Brooke*. *Susannah Eccard* had also died in the lifetime of *James Lafitte*, leaving the plaintiffs, *Jacob Eccard* and *Susannah Potter*, her only children. The question was, in what proportion the two plaintiffs were to take, (namely), one moiety between them as representing their mother, and *Jane Brooke* the other moiety; or whether they were to take *per capita*, one-third each, which depended on the construction of the word *or*. Lord *Alvanley*, M. R., decided, that they were equally entitled, and that the word *or* must be construed *and*; observing, that if he did not construe it so, he must adopt the argument that it was meant to substitute the children of each nephew or niece who should happen to die, in the room of their father or mother, for which he saw no sufficient ground; or he must say the clause was so uncertain, that he could give it to

(i) 2 Cox, 213.

none; for if the words were *strictly* adhered to, that uncertainty would arise (j). Or construed and.

The later case of *Horridge v. Ferguson* (k) resembles the two preceding cases, but more particularly that of *Richardson v. Spraag*. The bequest was of a residue to be divided amongst such of the children of *Thomas, Mary, William, Elizabeth*, and *James Henley*, as should be born in lawful wedlock, and living at the testatrix's decease, or the issue of such of them as should be married, in equal shares at twenty-one, or marriage, which should first happen. *James* died in the testatrix's lifetime. There were living at the testatrix's death two children of *Thomas*, five children of a deceased son, and two children of a deceased daughter of *Thomas*; one child of *Mary*; two of *William*; and one of *Elizabeth*. It was contended, that the residue should be divided into four parts, one-fourth paid to the child of *Mary*, another to the child of *Elizabeth*, another to the children of *William*, and the remaining fourth to the children and grandchildren of *Thomas*; but Sir *John Leach*, V. C., decided, that all the children and grandchildren took equally, observing, that the case before him resembled that of *Richardson v. Spraag*, and that the same reasoning applied.

Again, in the case of *Read v. Snell* (l), Mrs. *Read*, by a codicil, gave an annuity of 10*l.* to *J. S.*, if her, (the testatrix's) daughter should not attain twenty-one, or be married, and directed the interest and principal of her residuary estate to be settled by her executors and trustees upon “ her daughter, *or* the heirs of her body, as her executors and trustees should think fit.” By a second codicil, she bequeathed her wearing apparel to her maid, in case her daughter died under age, *or* unmarried: and it was determined in both bequests, that “ *or*” should be construed “ *and.*” Upon it being asked, what power was given to the trustees by the above words, if “ *or*” should be construed “ *and,*” the Court replied, “ a considerable one; they might judge of the fund in which the property was to be placed, of the manner in which the settlement should be made; they might insert proper clauses to make the disposition effectual; and that might be a very material power in this case, and this was agreeable to the nature and office of trustees. That an insurmountable difficulty

(j) See *Blackler v. Webb*, 2 P. Wms. 383.

(k) *Jacob*, 583; see also *Penny v. Turner*, 10 Jur. 768.

(l) 2 Atk. 643, 645, and see *Longmore v. Broom*, *infra*, p. 1412, and *Harris v. Davis*, 1 Col., (C.) 416.

Or construed
and.

to their having a disposing power was, that *King* being one of the legatees over, if he were the surviving trustee, and had such a power, he might direct the whole to accumulate, during the daughter's life, and so better his own interest."

Again, in *Weddell v. Mundy* (l), *William Hooper* bequeathed to his daughter the residue of his personal estate. "But if she died under twenty-one, or without leaving a lawful husband at her death," he gave the residue to other persons, after bequeathing some legacies, which he directed to be paid within twelve calendar months after his decease, on the event of his "daughter's death under age, as aforesaid." The daughter attained twenty-one, and married; and the question was, whether, as she attained twenty-one, she was not entitled to the residue absolutely? which depended upon this, whether "or," in the clause making further disposition of the residue should be construed "and." The Court said, the expression "under age as aforesaid," meant, not leaving a husband, and in that passage he seemed to have contemplated her death in his life. That there could be no doubt he meant "and" for "or;" and cases were not necessary for that construction, if the intention could be made out.

In *Monkhouse v. Monkhouse* (m), the bequest was of the produce of real estate to *J. A.* for life, and after his death to his eldest son lawfully begotten during his life, and to remain entailed on the eldest son descended from the said *J. A.*, and his posterity from one generation to another for ever; but in case of death or want of issue from the said *J. A.*, then over. Sir *L. Shadwell*, V. C., decided that "or" must be construed "and:" and that as *J. A.* died unmarried, the bequest over failed for remoteness, and that the testator's next of kin were entitled.

In *Miles v. Dyer* (n), the testator gave the residue of his real and personal estate to trustees upon trust out of the annual produce, to pay his wife an annuity during life, and to appropriate a competent part of the surplus for the maintenance and education of his children, to raise and pay to each of his children 2,000*l.* on their attaining twenty-one, and to accumulate the surplus income of his property during his wife's life; and at her decease, to convert into money his residuary property, and divide the proceeds equally among her children on their attaining the said age of twenty-one, the testator then added the following words, "and in

(l) 6 Ves. 341.

(m) 3 Sim. 119.

(n) 5 Sim. 435; 8 Ib. 330.

case all my said children shall happen to depart this life in the lifetime of my said wife, *or* under the said age of twenty-one years, and without leaving lawful issue of their, his, or her body,” then over. The question was, whether the children, having all attained twenty-one, were entitled, notwithstanding the mother was living, to vested interests in the produce of the testator’s residuary estate. Sir *L. Shadwell*, V. C., decided in the affirmative, observing that this case was one of that numerous class, in which the word “*or*” ought to be read “*and* ;” and that it was clear the testator did not mean the trust property to go over, if his children attained twenty-one, or if they died under twenty-one, leaving issue.

*Or construed
and.*

The case of *Mytton v. Boodle* (o) seems to have been decided upon the same principle; in that case, a legacy of 5,000*l.* was given to *A.* if he attained twenty-one, but if he should not attain that age, *or* die without leaving issue male of his body, living at his death, then over. The same Judge decided, that *A.* having attained twenty-one took absolutely, it being clearly the testator’s intention that if *A.* attained twenty-one, he should have the legacy, and if he died under twenty-one, leaving issue male, that he should also have it.

A reference in this place to cases of devises of *real estate*, and surrenders of copyhold, wherein “*or*” has been construed “*and*,” may not be unacceptable to the reader.

Thus, where the devise over was, in case the devisee should die under twenty-one, *or* before marriage, *and* without issue (*p*); again if devisee die before twenty-one, *and* unmarried, *or* without issue (*q*).

So, if devisee should die before twenty-one, *or* without issue (*r*).

Again in a surrender of copyhold, the words were, “if surrenderee should die in the lifetime of the surrenderor, *or* without issue” (*s*).

So also, where the devise was to *A.* *or* his heirs (*t*).

(o) 6 Sim. 457; *Green v. Harvey*, 1 Hare, 428.

(p) *Surtees v. Barker*, cited in 2 Ves. sen. 67; *S. C.*; 2 Stran. 1175.

(q) *Framlingham v. Brand*, 3 Atk. 390; *Grimshawe v. Pickup*, 9 Sim. 591.

(r) *Soulls v. Gerrard*, Cro. Eliz. 525; *Price v. Hunt*, Pollexfen, 645;

Walsh v. Peterson, 3 Atk. 193; *Eastman v. Baker*, 1 Taunt. 174; *Hasler v. Sutton*, 1 Bing. 500, and see *Brownword v. Edwards*, 2 Ves. sen. 243, 249.

(s) *Wright v. Kemp*, 3 T. R. 470.

(t) *Wright v. Wright*, 1 Ves. sen. 409; also 2 Atk. 645, per Lord Hardwicke.

*And construed
or.*

And, where a surrender of copyhold was to *A. or his assigns* (u).

But in a bequest of money to be laid out in lands of 300*L* or 400*L* a year, it has been construed in the most liberal sense, namely, 400*L* a year (v).

2. "*And*" construed. "*or*."

2. We proceed in the next place to cases, wherein "*and*" has been construed "*or*" to effectuate the testator's intention.

Thus in *Maberly v. Strode* (w), *Samuel Strode* bequeathed all his residuary estate (which was to be converted into money) to trustees, to invest in government or on real securities, and to pay the dividends or interest to his son *Samuel Strode*, for life, and after his death to transfer the principal unto and amongst all his son's children, as therein directed. But if his son died unmarried, *and* without issue, or, having issue, being sons, they should die under twenty-one, or being daughters, they should die before twenty-one, or marriage, then in trust to transfer the principal of the funds unto his nephews and niece, as mentioned in his will; provided that if his son married, he might settle 2,000*L* out of the principal funds and securities, for every 1,000*L* he received with his wife, in bar of dower. *Samuel Strode* married, but died without issue; and one of the questions was, whether the executory bequest to the nephews and niece was good, *Samuel Strode* not having died unmarried; and Lord *Alvanley*, M. R., decided that it had taken place; that the word *and* must be construed *or*, and that the word "unmarried" did not refer to marriage at any particular time, but that the testator meant never having been married at all; which was the usual construction, and there was nothing in the will before him to induce the Court to put an unusual construction upon it.

Again in *Bell v. Phyn* (x), *James Phyn* bequeathed the residue of his personal estate equally between his three children *George*, *Jane*, and *Catherine*; and in case of the death of any of them without being married, *and* having children, the share of such child so dying to be divided between the surviving children; and so, if one of his children should only survive. The testator left his widow, and the three children named in the will. *Jane* married *William Bell*, who had one child: a question arose, whether Mrs. *Bell* took a vested interest in her share of the

(u) *Furnival v. Crew*, 3 Atk. 83, 86.

(v) *Seale v. Seale*, 1 P. Wms. 290.

(w) 3 Ves. 450; see also *Hepworth v. Taylor*, 1 Cox, 112.

(x) 7 Ves. 454, 458.

residue, which depended upon the construction of the words "without being married *and* having children." Sir *William Grant*, M. R., was of opinion that the words "without being married" must be construed "without having ever been married;" that the contingency of dying unmarried and without children, could not, properly, be said to mean anything more than the latter event; as, legally speaking, there could be no children without a marriage; and therefore to give effect to all the words, it was almost necessary to construe the copulative as disjunctive (*y*).

And construed or.

3. Lastly, we notice cases, wherein the construction of *or* for *and*, and *and* for *or* has been contended for, but not allowed.

3. *And and or, construed literally.*

As the Court of Chancery construes these words so as to effectuate the general intention, it follows that it will not consider itself warranted in making the alteration, unless it be clearly authorized by the meaning of the testator, as collected from the whole will.

Thus in the case of *Doe v. Cooke* (*z*), *Thomas Browning* bequeathed leasehold property to *Thomas Cooke* for life, and after his decease to his child or children thereafter to be begotten, his, her, and their executors, administrators, and assigns for ever. But in case the said *Thomas Cooke* should die an infant unmarried and without issue, then the testator bequeathed the property to the defendants. Soon after the testator's death *Thomas Cooke* entered, and afterwards married one of the lessors of the plaintiff, and then died without having had any issue. The question was, whether, in the event that had happened, the bequest over to the defendants was void. Lord *Ellenborough* was of opinion that the will could not be read as if it had been, "If he died an infant, *or* unmarried, *or* without issue;" for then, had the legatee died an infant, leaving children, the estate would have gone over, which could not be the intention: and his Lordship said, that the most rational construction was to construe it as Lord *Hardwicke* did the devise in *Framlingham v. Brand* (*a*), as one contingency; viz. *Thomas Cooke's* dying an infant; attended with two qualifications, viz. his dying without leaving a wife surviving him, *or* dying without issue: that the contingency, upon which the estate was to go over, was to

(*y*) See also the cases of *Dobbins v. Bowman*, 3 Atk. 408; *Bush v. Dakoway*, 1 Ves. sen. 19, and *Hawes v. Hawes*, *supra*, p. 1389; *Stubbs v. Sargon*, 2 Keen, 355, *affd.*, 3 Myl. & C. 507; *Hetherington v. Oakman*, 2 Yo. & Coll. (C.), 299.
 (*z*) 7 East, R. 269; see also *Dillon v. Harris*, 4 Bligh, 324.
 (*a*) 3 Atk. 390.

And and or,
construed literally.

consist of three things, the death of *Thomas* during his infancy, without leaving wife or child: and judgment was accordingly given for the plaintiff.

The case of *Doe v. Rawding* (b), is one of a devise of real estate, but otherwise in point with the preceding case of *Doe v. Cooke*. In that case, Mr. Justice *Holroyd* said, there did not appear anything in the will to make it necessary to alter the word *and* into *or*. Mr. Justice *Best* said, that all three things, namely, the dying under twenty-one, the dying unmarried, and the dying without lawful issue must happen, before the devise over could take effect; but there, all three had not happened, for though the devisee died under twenty-one, she died a married woman; so that the estate descended upon her heir, and did not go to the devisee over.

In *Longmore v. Broom* (c), *Thomas Longmore* bequeathed his personal estate to executors, upon trust to apply and dispose of the same unto and among his two brothers, *Joseph* and *Benjamin Longmore*, and his sister, *Hannah Longmore*, or their children, in such shares and proportion, and at such time or times as they his trustees, or the major part, or the survivor of them, his executors or administrators, should in their discretion think proper. *Joseph* and *Benjamin* having children living at the testator's death, and the executors having neglected to exercise the discretionary power committed to them respecting the distribution of the testator's property, the question was, whether the children were to take a joint interest with their parents, under the above bequest, or were to be excluded? For the children it was urged, that "*or*" might be construed "*and*" for this purpose, if such construction were necessary. But Sir *William Grant*, M. R., in decreeing that the funds must be given equally between the parents and the children, although the executors themselves were not so restrained, observed, the bequest before him was not a direct bequest to the objects, but a bequest to the executors, with an *authority* to dispose among them. The cases were very different. In the former, the Court must, of necessity, construe those words; otherwise the bequest would be void for uncertainty. His Honor then continued: "A bequest to *A.* or *B.*, is void; but a bequest to *A.* or *B.*, at the discretion of *C.* is good, for he may divide it between them (d). That is the case of this will. I am not called upon to make any alteration in, or addition to

(b) 2 Barn. & Ald. 441.
(c) 7 Ves. 124.

(d) *Lee v. Okey*, 1 Yo. & Coll. (E.), 550.

this will; which the Court never does without necessity. A discretion is given to the executors. Could I have said, they were precluded from giving any thing to the children? I think not, and it would be a great deal to say that. The executors then, having that discretion, might say to whom the fund should be given, the parents or the children; but the Court has not that discretion; it has only to say, what class is to take; and then the distribution must be equal" (e).

And and or.
construed literally.

In the case of *Newman v. Nightingale* (f), where the bequest was of 500*l.* "to the sole use of Mrs. *Elizabeth Newman*, or of her children for ever," a question arose, whether Mrs. *Newman* took an absolute property in the sum, that is, whether the words were to be construed "to Mrs. *Newman and* her children," so as to give her a share equally with her children; or whether the bequest was to Mrs. *Newman* for life, and after her death to her children: and Lord *Thurlow* was of opinion that the latter was the true construction.

In *Girdlestone v. Doe* (g), the testator bequeathed to *Mary Tattershall* the yearly sum of 40*l.*, to be paid out of the dividends of his long annuities for life, and after her decease, he bequeathed the same to his nephew *James Holman*, or his heirs. The question was, whether *James Holman* took an absolute interest. Sir *L. Shadwell*, V. C., decided in the negative, being of opinion 'or' must be construed disjunctively there, as the context required; and that the testator contemplated that his nephew might not be alive at the death of *Mary Tattershall*; and therefore, that the nephew did not take an absolute interest in the annuity. But his Honor's argument from the context as reported does not appear conclusive. When the testator intended only to give a life interest, he uses suitable words in the bequest to *Mary Tattershall*; and the inference is strong, that in the bequest to *James Holman* 'or his heirs,' he intended to give the absolute interest using 'or' for 'and.' A devise of real estate to *A. or* his heirs passes the fee (h).

In *Jones v. Torin* (i), the bequest was in trust for the testator's daughter for life, and after her decease to the children, or their descendants of his said daughter, in such proportions as she should appoint. The testator's daughter died without making

(e) See *Read v. Snell*, *supra*, p. 1407.

(f) 1 Cox, 341; see also *Montagu v. Nucella*, 1 Russ. 165.

(g) 2 Sim. 225.

(h) *Supra*, 1409.

(i) 6 Sim. 255.

"And" and
"or," con-
strued literally.

any appointment, leaving three children. Sir *L. Shadwell*, V. C., decided that the descendants were mentioned merely as substitutes for the children, and that there was a direct gift with a power of selection; and that the children were absolutely entitled in equal shares.

So in *Gittings v. M'Dermott* (*j*), the 'or' was construed literally: there the bequest was to the children of *E. W.* (naming them), or to their heirs; three of the children died in the testator's lifetime. Sir *John Leach*, M. R., held that their legacies did not lapse, but that their next of kin took by substitution at the testator's death.

SECT. V. Of Bequests to the separate use of married women.

Of bequests to
separate use of
married
women.

When legacies are given to the use of married women, and it appears to be the intention of the testator, that the husbands of the legatees should take no interest in the bequests, the Court of Chancery will convert the husbands into trustees for their wives, although no trustees are appointed by the testament. In the case of *Harvey v. Harvey* (*k*), Lord *Cowper* entertained a doubt, whether a married woman could take an interest distinct from her husband, without the intervention of trustees; but it seems that doubt is removed by the decision of Sir *Joseph Jekyll*, M. R., in *Bennet v. Davis* (*l*).

First, where the bequest has been considered as giving a separate interest.

The following words have been held, *per se*, and independently of any contrary intention to be collected from other parts of the will, to give legacies to the separate use of married women; namely, a legacy to a married woman, with a declaration, "*that her receipt shall be a sufficient discharge to the executors*" (*m*): or, "*for her sole and separate use*" (*n*): or "*for her sole use and benefit*" (*o*): "*for her sole use*" (*p*): or, "*for her own use, and to*

(*j*) 2 Myl. & K. 69.

(*k*) 1 P. Wms. 125.

(*l*) 2 P. Wms. 316.

(*m*) *Lee v. Prieaux*, 3 Bro. C. C. 381.

(*n*) *Darley v. Darley*, 3 Atk. 399; *Johnson v. Johnson*, 1 Keen, 648.

(*o*) *Adamson v. Armitage*, Coop.

283; *S. C.*, 19 Ves. 416; *Inglefield v. Coghlan*, 2 Coll. (C.), 247; *ex parte Killick*, 3 M., D. & D. 480.

(*p*). *Ex parte Ray*, 1 Mad. 199; 4 Ib. 410, note; *Lindsell v. Thacker*, 12 Sim. 178; *Hobson v. Ferraby*, 2 Coll. (C.), 412, 421; *Steedman v. Poole*, 11 Jur. 449.

be at her disposal" (q): or, "*to be at her disposal, and do therewith as she shall think fit*" (r): "*to be by her laid out in what she shall think fit*" (s): or, "*for her own use, independent of her husband*" (t): or "*to be paid into her own hands*" (u): or "*for her livelihood*" (v). To A. for her own use and benefit independent of any person (w), to females for their own benefit and their children, and not to be subjected to the control of their husbands (x).

Of bequests to separate use of married women.

The gifts in some of the preceding instances were to trustees, which is an additional circumstance in favour of the intention to give the legacy to separate use independently of the husband; but it is by no means a necessary ingredient, as the other cases will shew; nor indeed is it, of itself, a sufficient evidence of such intention.

Secondly, where the bequests have been construed *not* to give a separate interest to the exclusion of the husband.

And here it is to be observed, that the Courts of Equity will not deprive the husband of the right to participate in his wife's property, unless a clear intention be manifested by the testator, that the husband was not to derive any benefit from the disposition.

Thus in *Dakins and wife v. Berisford* (xx), the defendant's brother bequeathed leaseholds to the defendant, in trust to sell; and out of the produce to purchase in his own name an annuity of 80*l.* for the life of the plaintiff's wife, and pay the same *to her and her assigns*. The plaintiff, though living apart from his wife, claimed the annuity; which demand was resisted on the ground, that it was the intention of the testator, that the wife should enjoy the annuity for her separate use, manifested in the direction to the defendant to purchase it in his own name, in trust for the wife of the plaintiff. But Sir *Harbottle Grimstone*, M. R., decided that, as there were no negative words in the will to exclude the husband, he could not deprive him of his legal right to the annuity.

Lomb

Again, in *Lambe v. Milnes* (y), *George Cotton* bequeathed his

(q) *Prichard v. Ames*, 1 Turn. 222; but see *Massey v. Parker*, 2 Myl. & K. 174, and *Kensington v. Dollond*, Ib. 184.

(r) *Kirk v. Paulin*, 7 Vin. Abr. 95, pl. 43.

(s) *Atcherley v. Vernon*, 10 Mod. 531.

(t) *Wagstaff v. Smith*, 9 Ves. 520; *Gilchrist v. Cator*, 11 Jur. 448, and

Steedman v. Poole, ubi supra.

(u) *Hartley v. Hurle*, 5 Ves. 540, s. q. vid. *Tyler v. Lake*, 4 Sim. 150.

(v) *Darley v. Darley*, ubi supra.

(w) *Margetts v. Barringer*, 7 Sim. 482.

(x) *Bain v. Lescher*, 11 Sim. 397.

(xx) Chan. Ca. 194.

(y) 5 Ves. 517.

Of bequests to
separate use of
married
women.

residuary personal estate to trustees, in trust to pay a part, or the whole, on a certain event, of the interest to his niece *Elizabeth*, the wife of *Richard Milnes*, for life, half-yearly; and to apply the capital to such uses as she, whether sole or covert, by deed or writing sealed and attested, as thereby required, or by her last will and testament in writing, or any writing purporting to be such, signed and published as therein directed, should limit and appoint; and in case of no appointment, then to the use of the legal representatives of *Elizabeth Milnes*, including her husband, if then living, in due course of administration. *Richard Milnes* became bankrupt; and the question was, whether, under the above bequest, *Elizabeth Milnes* was entitled to receive the interest of the testator's residuary estate, separate from and independent of her husband; or whether his assignees were entitled to it during her life. Lord *Alvanley*, M. R., was of opinion, that the words of the will were not sufficient to give the interest to *Elizabeth Milnes*' separate use; the assignees, therefore, were entitled on making a provision for the wife.

The two preceding cases prove that the gift being to trustees is not of itself sufficient; the following cases are instances, wherein no trustees were interposed, but the words of the bequest were stronger.

Thus in *Wills v. Sayers* (z), *J. Kilwick* bequeathed to the defendant 600*l.* stock, upon trust to apply the dividends for the sole and separate use and benefit of his daughter, the plaintiff *Mary Wills*, and her receipts were to be sufficient discharges. The testator then bequeathed the residue of his personal estate and effects, after payment of debts, &c. unto the plaintiff *for her own use and benefit*. The question was whether these last words, used in the residuary bequest, gave the plaintiff a separate estate. And Sir *John Leach*, V. C., decided that they did not: observing, that the testator, as to the same person with respect to another gift, had appointed a trustee, and expressly directed the application of it to her sole and separate use; he knew, therefore, the technical form of excluding the right of the husband; and his Honor said he could not infer that, as to the residuary bequest, the testator intended what he had not expressed.

Again, in the case of *Roberts v. Spicer* (a), *Thomas Marvin* bequeathed to his daughter *Charlotte* wife of *James Abbott*, the sum of 200*l.* "*to and for her own use and benefit*:" and the testator gave a further sum of money, and the rent of a house to

(z) 4 Madd. 409.

(a) 5 Mad. 491.

trustees, and directed them to stand possessed thereof for the benefit of the said *Charlotte Abbott* and her children; and that the same should not be subject to the debts, engagements, or in any manner under the control of her husband. *James Abbott* became bankrupt; and the question was, whether the assignees were entitled to the legacy of 200*l.*: and Sir *John Leach*, V. C., held clearly that it could not be considered a gift to the separate use of the wife, and referred to the case of *Wills v. Sayers* as being in point; and directed a reference to the Master to consider of a proper settlement on the wife and children (*b*).

Bequests to separate use of married women.

In *Wardle v. Claxton* (*c*), the testator bequeathed his residuary property to trustees to invest and pay the interest and dividends thereof to his wife for life, "to be by her applied for the maintenance of herself and such child or children as the testator might have at her death." Sir *L. Shadwell*, V. C., held this not a gift to the separate use of the widow who had married again.

Lastly, in *Blacklow v. Laws* (*d*), the testator directed an annuity to be paid by the trustees appointed by his will into the proper hands of his daughter *A.* the wife of *L.*, for her own proper use and benefit. Sir *James Wigram*, V. C., held it not a gift to the separate use of *A.*, feeling himself bound by the decision of *Tyler v. Lake* (*e*), but that he was deciding against the real intention of the testator: in his judgment his Honor entered into a discussion of the authorities bearing on the point.

SECT. VI. What words of recommendation, &c. raise trusts by implication.

Where a person bequeaths property to another absolutely, or for life (*f*), accompanied with words expressive of recommendation, request, hope or expectation, that the legatee will dispose of the gift as his own to or among one or more objects, the Court of Chancery will construe such recommendation or request as a trust; provided the words be *imperative*, and the objects and the property *certain* (*g*). The rule was clearly laid down by

Words of recommendation creating trusts by implication.

(*b*) See the cases collected in 2 vol. Roper's Husband and Wife. Chap. 18, sect. II; see also *Massey v. Parker*, 2 Myl. & K. 174; *Kensington v. Dollond*, Ib. 184.

(*c*) 9 Sim. 524.

(*d*) 2 Hare, 49.

(*e*) 2 Russ. & M. 183; see *Pycroft v. Christy*, 3 Beav. 238.

(*f*) The law seems otherwise in devises of real estate; see *Crossling v. Crossling*, 2 Cox, 396.

(*g*) 2 Scho. & Lef. 189.

Words of recommendation creating trusts by implication.

Lord *Eldon* in *Wright v. Athyns* (*h*), a case of devise of real estate; but it is equally true as applied to bequests of personality.

We shall consider those cases, *first*, wherein the recommendation has been considered a trust, and in which the three requisites were considered as concurring; and, *secondly*, those wherein the recommendation has not been so considered.

1. *First*, where the recommendation has been considered a trust or devise by implication.

The word "desire."

In *Mason v. Limbury* (*i*), the testator bequeathed thus: "I give to my brother *Robert Mason*, 2,000*l.* which *I desire* him at his death to give to his son, and his children, and to the children of his late daughter, as he should think fit." *Robert Mason* died in the testator's lifetime, after whose death his children and the children of his daughter, were held entitled to the 2,000*l.* in equal shares.

Again, in *Eales v. England* (*j*), *Elizabeth Heydon* bequeathed thus: "I give to *B.* 300*l.*, 100*l.* of which he owes me by bond, which I intended to have given his daughter *C.*; but my will is, that he give the 300*l.* to *C.* at his death, or sooner, if there be occasion, for her better preferment." Although *B.* died before the testatrix, the bequest to *C.* was established as an absolute trust in her favour, whenever *B.* should die.

Again, in *Harding v. Glyn* (*k*), *Nicholas Harding* gave unto his wife *Elizabeth* all his estate, leases, and interest in his house in *Hatton Garden*, and all the goods, furniture, and chattels therein at the time of his death, and also all his plate, linen, jewels, and other wearing apparel, but did *desire* her at or before her death, to give such leases, house, furniture, goods and chattels, plate and jewels, unto and amongst such of his own relations, as she should think most deserving, and approve of. *Elizabeth*, neither by will, nor in her lifetime, gave the goods in the said house, nor her husband's jewels to his relations: and *Verney*, M. R., decided that *Elizabeth* took only beneficially during her life, and that the desire of the testator, expressed in his will, amounted

(*h*) 1 Turn. 157; see also *Morice v. Bishop of Durham*, 10 Ves. 538.

(*i*) Cited in *Vernon v. Vernon*, Amb. 4.

(*j*) Pre. Ch. 200.

(*k*) 1 Atk. 468, stated from Register's book, 5 Ves. 501, per Lord *Alvanley*, cited 8 Ves. 571, and discussed by Lord *Eldon*; see also 1 Turn. 161.

to a trust for such of the testator's relations, as were his next of kin at the death of *Elizabeth*.

Words of recommendation creating trusts by implication.

Again, in *Massey v. Sherman* (l), the testator devised his copyholds to his wife, "not doubting but that she would dispose of the same to and amongst his children, as she should please;" and these words were held to create a trust for the children, subject to the wife's appointment.

"Not doubting."

So also in *Nowlan v. Nelligan* (m) the words of the will were, "I give and devise unto my beloved wife, *Harriet Nowlan*, all my real and personal estate; I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness, as well as mine, to see her comfortably provided for; but in case of death happening to my wife, I hereby request my friends *Stables* and *Hunter* to take care of, and manage, to the best advantage, for my lovely *Harriet Nowlan*, all and whatsoever I may die possessed of." Lord *Thurlow*, C., was of opinion, that a trust was well raised for the daughter in the whole of the testator's property, subject to the life interest of the wife.

"Request."

Again, in *Pierson v. Garnet* (n), *John Garnet*, after the death of several annuitants, disposed of his residuary estate as follows: "I bequeath the said residue to the said *Peter Pierson*, his executors, administrators, and assigns, and it is my dying request to the said *Peter Pierson*, that if he shall die without leaving issue living at his death, that the said *Peter Pierson* do dispose of what fortune he shall receive under this my will, to and among the descendants of my late aunt, *Ann Coppinger*, his grandmother, in such manner and proportion as he shall think proper." The disposition in favour of the descendants of *Ann Coppinger* was decided to be imperative, and to amount to a trust to them after the death of *P. Pierson* (o).

In *Foley v. Parry* (p), the testator gave his real estates to his wife for life, remainder to *W. W. Foley* for life, with remainders over; he then gave his residuary personal estate to trustees upon trust, (subject to the payment of his debts, legacies, and certain annuities), to pay the interest to his wife for life, and after her decease in trust for *W. W. Foley*, his executors, &c., and to assign and transfer the capital on his attaining twenty-one;

(l) Ambl. 520.

Ves. 536; 1 Turn. 162.

(m) 1 Bro. C. C. 489.

(p) 5 Sim. 138, confirmed on ap-

(n) 2 Bro. C. C. 226; S. C., Prec. Chan. 201, note, ed. Finch. 1786.

peal by *Brougham*, C., 2 Myl. & K. 138, and see *Kilvington v. Gray*,

(o) See Lord *Eldon*'s observations on this case, 8 Ves. 573, 574; 10

10 Sim. 293.

Words of recommendation creating trusts by implication.

adding, "It is my *particular wish and request* that my dear wife, and *W. W.*, the grandfather of the said *W. W. Foley*, *will superintend and take care of his education*, so as to fit him for any respectable profession or employment."

Sir *L. Shadwell*, V. C., held, that *W. W. Foley* was entitled to be maintained and educated during his minority in the manner described out of the income of the testator's estate.

"Recommend."

Again, in *Malim v. Keighley* (q), *Thomas Lowe*, after giving his residuary estate to his three daughters, *Lucy*, *Elizabeth*, and *Sarah*, and their children as mentioned in his will, proceeded thus: "and in case the whole of the residue of my personal estate shall become vested in any one of my said daughters, then I do give and bequeath the same, after the expiration and determination of the several trusts before mentioned, unto such surviving daughter, her executors and administrators; hereby *recommending* it to such daughter to dispose of the same, after her own death, and the determination of the several trusts aforesaid, unto and among the children of my daughter, *A. Malim*, and my nephew, *J. Lowe*; *desiring* that his reputed daughter, *Emilia*, though born before marriage, may be considered as one of his children." The whole residue became vested in the testator's daughter, *Sarah*. The trusts above alluded to being all determined, and *Sarah* dead without issue, and intestate, the question was, whether a trust was well created of the residue for the children of *A. Malim* and *J. Lowe*; and Lord *Alvanley*, M. R., decided that it was, observing, that "recommended" amounted to a request and more. The decree was afterwards affirmed upon appeal (r). *

"Authorize and empower."

So, in *Brown v. Higgs* (s), *Henry Brown*, after subjecting the rents of his estate at *Brise Norton* to various charges, proceeded thus: "After the above trust is performed, I authorize and empower my nephew, *John Brown*, to receive the remainder of the rent that arises from my estate at *Brise Norton*, over and above the 100*l.* I have directed to be paid to my wife, and to dispose of it in the following manner: to take 100*l.* of it every year to his sole and separate use, and to employ the remainder, after paying the annual rent to the college and the fines for renewal of the leases, and other necessary expenses about the farms, to such children of my nephew, *Samuel Brown*, as my nephew,

(q) 2 Ves. jun. 333.

495, and affirmed on appeal, 8 Ves.

(r) Ibid. 529; *vide infra*, p. 1424.

561, and in D. P. in 1813; 18 Ves.

(s) 4 Ves. 708, continued 5 Ib. 192.

* See *Johnson v. Rowland* 12 Jurist 769

John Brown, shall think most deserving, and that will make the best use of it; or to the children of my nephew, *W. A. Brown*, if any such there are or shall be. The nephew, *John Brown* died before the testator. *Samuel* also died in the testator's lifetime, leaving several children; and *W. A. Brown* was unmarried at the hearing of the cause. The question was, whether the surplus rents, (after the charges imposed by the will), given "to such children of *Samuel Brown* as *John Brown* shall think most deserving, &c., or to the children of *W. A. Brown*, if any such there are or shall be," were a gift to all the children, or to such of them only as the testator's nephew, *John Brown*, who died during his life, should appoint? Upon which Lord *Alvanley*, M. R., observed, "If the former can be collected as his intention, the death of the trustee can make no difference (t). If that intention cannot be collected, the selection not having taken place, whatever the reason of its failing may be, the bequest must fail with it. Upon the true construction of this will, I am of opinion, it is equivalent to saying, he gives it to the children of *Samuel Brown*, or of *W. A. Brown*, with a power to *John Brown* to select any he thinks fit, and to exclude the others; and it is too much to contend, that nothing is intended for them exclusive of the appointment of *John Brown*. The fair construction is, that at all events the testator meant it to go to the children; and these words of appointment he used only to give a power to *John Brown* to select some and exclude the others." Lord *Alvanley*, in the course of his observations, said, that as to the point in question, he could not distinguish the present case from *Harding v. Glyn* (u).

Words of recommendation creating trusts by implication.

The question in the preceding case was, in fact, whether the words created a trust or a power in *John Brown*? With reference to which subject Lord *Eldon* remarks (v), in the course of his judgment upon the appeal to him from the hearing at the Rolls, "That it is perfectly clear, that where there is a mere power of disposing and that power is not executed, this Court cannot execute it (w). It is equally clear that, wherever a trust

(t) See *Brown v. Pocock*, 6 Sim. 257; also *Grieverson v. Kirsopp*, 2 Keen, 653.

(u) *Supra*, p. 1418.

(v) 8 Ves. 570, 574.

(w) In *Ray v. Adams*, 3 Myl. & K. 237, a power of distribution was given to the donee, "not doubting"

she would dispose of the fund for the benefit of such of the testator's poor relations as might stand in need. But the power was not given until after the death of the testator's son, who survived the widow, and the power never vested in the widow; see also *Griffiths v. Evan*, 5 Beav.

Words of recommendation creating trusts by implication.

is created, and the execution of that trust fails by the death of the trustee, or by accident, this Court will execute the trust:" and again, "If a power is a power which it is the duty of the party to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts; and will not permit his negligence, accident, or other circumstances to disappoint the interest of those, for whose benefit he is called upon to execute it."

In the case of *Birch v. Wade* (x), *John Willdon* bequeathed the residue of his real and personal estate to trustees upon trust, after payment of debts and legacies, to pay the interest to his wife for life, and after her death, to pay one-third of the interest to the testator's brother *Thomas* for life, one other third of such interest to his sister *Charlotte Birch* for life, and the remaining third to his sister *Elizabeth Morris*; that at the death of *Charlotte Birch*, one-third of the principal should be paid amongst such of her children as she should think proper: that after the death of the testator's brother *Thomas*, one-third of the principal should be paid to his brother's son; and the testator concluded thus:

"Will and desire," with power of selection.

"It is my *will and desire*, that the other third part of the principal of my estate and effects be left entirely to the disposal of my dear and loving wife, among such of her relations as she may think proper, after the death of my aforesaid sisters." The wife died without making any disposition; and the question was, whether the words of the will imposed a trust in her for her own relations, or whether it was only a power; Sir *William Grant*, M. R., decided that it was a trust for such relations of the wife, as were living at her death; observing, that after the best consideration he could give the case, it did not appear to him to differ materially from the cases of *Harding v. Glynn* and *Brown v. Higgs*: and he decreed accordingly in favour of such persons as were the next of kin of the testator's widow at the time of her death.

241, where the words "confiding in her the devisee not to alienate or transfer the estate from his (the testator's) nearest family," were held to give the donee a power of appointment to "the heir," and conse-

quently that her appointment to her husband was void.

(x) 3 Ves. & Bea. 198; see also *Tibbits v. Tibbits*, 19 Ves. 656; 1 Jacob, 317.

In *Prevost v. Clarke* (y), *Ann Prevost* gave the residue of her property, which consisted of personalty, equally amongst her four children, *Sir George, James, and William Prevost*, and *Ann Clarke*; and directed the share of *Ann Clarke* to be vested in trustees; declaring that it was her intention, "that the property of the said stock, and the free disposal thereof, save the prayer to *Mr. Clarke* contained in this will, to either of the survivors upon the demise of *Mr. and Mrs. Clarke*." The testatrix added the following words: "Convinced of the high sense of honour, the probity and affection of my son-in-law, *Edward Clarke*, I entreat him, should he not be blessed with children by my daughter, and survive, that he will leave at his decease to my children and grandchildren the share of my property I have bestowed on her." Upon a bill by the children and grandchildren for a declaration of the rights of the parties in the fourth of *Ann Clarke* in the residue of the testatrix's personal estate, it was insisted for the plaintiffs, that the words of the will created a trust for the children and grandchildren: and *Sir John Leach*, V. C., said he could not distinguish the case from *Brown v. Higgs*, which appeared to him a direct authority: that in that case, as in the one before him, there was a power of selection.

Words of recommendation, creating trusts by implication.

"Entreat," with power of selection.

Again, in *Cruwys v. Colman* (z), *Dorothy Cruwys* bequeathed thus: "I make my only sister whole and sole executrix to everything I have for her life (*Mrs. Bridget Cruwys*); and it is my absolute desire that my sister, *Mrs. Bridget Cruwys*, which I have made my only executrix, bequeaths at her own death to those of her own family what she has in her own power to dispose of, that was mine; provided they behave well to her, with decency and affection." *Bridget Cruwys*, by her will, declared, that it was her will to die intestate as to the estate and effects of her sister *Dorothy*, so bequeathed to her as aforesaid; and *Sir William Grant* decided, that it was a trust in favour of the next of kin of *Bridget*, as she had not exercised her power of selection.

"Desire," with power of selection.

In *Forbes v. Ball* (a), *Dennis Cotterel* disposed as follows: "I give to my dear wife, *Ann Cotterel*, the sum of 500*l.*; and it is my will and desire that my said wife, *Ann Cotterel*, may dispose of the same amongst her relations as she by will may think proper." *Ann Cotterel* bequeathed to her sister (the

(y) 2 Mad. 458.

(z) 9 Ves. 319.

(a) 3 Meriv. 437; see also *Hinx-*

man v. Poynder, 5 Sim. 546, "Wish and desire."

Words of recommendation, creating trusts by implication.

"Will and desire," with power of selection.

defendant) *Jane Ball* and the defendant *Pawson* the sum of 500*l.* in trust to lay out the same in their names in the public funds, upon trust to apply and retain the dividends to her said sister for her own use for her life, towards the maintenance of her children, and after her death to pay the funds to her children equally; and she made her sister her residuary legatee. The question was, whether the will of *Ann Cotterel* was a due execution of the power of appointment given her by her husband's will, or whether the 500*l.* fell into the residue of the testator's estate? It was insisted, that *Ann Cotterel* never intended to execute the power; on the other hand it was insisted, that it was well executed; if not, that it was a trust for her relations. The Court was of opinion, that the words in the testator's will raised a trust for the wife's relations, subject to her appointment, which was well executed by her will in favour of her sister and sister's children.

"Recommend."

Lastly, in *Horwood v. West* (b), *John Powell* bequeathed to his wife *Margaret Powell* all his personal estate, for her sole use and benefit, *relying on her*, that if she should thereafter marry, she would secure to herself whatever she should possess by virtue of his will, so that the same should not be subject to debts, &c. of her husband; and he thereby *recommended* her, that she should, by her will, bequeath what she should die possessed of under his will in the manner therein mentioned (equally between his two sisters *Lettice* and *Mary*). After her husband's death, *Mrs. Powell* possessed herself of the whole of her husband's personal estate, and applied the whole to her own use, except a part, which she invested in the purchase of 400*l.* stock, in the joint names of herself and *West* the defendant; by her will she gave all the residue of her personal estate in moieties to *Lettice* and *Mary*, the sisters of her late husband, and appointed the plaintiff her executor. *Mrs. Powell* received the dividends of the 400*l.* stock during her life, and at her decease that sum remained standing in her and defendant's name. The plaintiff filed a bill against the defendant for a transfer of the 400*l.* stock to the plaintiff for the purposes of *Mrs. Powell's* will. Sir *John Leach*, V. C., dismissed the bill, considering, upon the construction of the whole will, that the testator did not intend his wife to dispose of what she thought proper during life, and that

(b) 1 Sim. & Stu. 387; see also *notis, Broad v. Bevan, Ford v. Fowler*, 3 Beav. 146.
Dashwood v. Peyton, 18 Ves. 41;
Abraham v. Alman, 1 Russ. 511, in

the recommendation embraced only such part as might remain at her death undisposed of (which would have rendered the subject uncertain); but that the testator included in the recommendation the whole of his property. His Honor appeared of opinion, that the former part of the bequest might seem to allude only to what might be undisposed of at her death, but that that intention was negatived by the direction upon her marriage, which might happen at any time, to settle the *whole*.

Words of recommendation not creating trusts.

In the case of *Broad v. Bevan* (c), the testator gave to his daughter Ann an annuity of 5*l.* for life, and added, I also *order and direct* my son *Joseph* to take care of and provide for my said daughter *Ann* during her life. Sir *Thomas Plumer*, M. R., held she was entitled to a provision out of the residue bequeathed to *Joseph*: and it was referred to the Master to inquire and state what would be a proper allowance, and his report of such allowance was confirmed by Lord *Gifford*, M. R.

"Order and direct."

2. We *secondly* proceed to the consideration of those instances, wherein the bequest has not been considered to raise a trust by implication, which has been the case wherever an absence of any one or more of the three requisites before mentioned has occurred; and

2. Recommendation not raising trusts.

First, where the words of recommendation, request, &c. are not considered *imperative*; for, in this case, the presumption of implied trust will be rebutted: for instance, where the testator recommends or empowers *A.* to give part of his property to *B.*, or among other persons as he shall think fit, and *A.* takes no interest whatever by the will in that part of the property, over which the power extends; in such case it seems the words would be construed to import no more than a power, which, not being executed, the objects mentioned will take no benefit.

1. Where words not imperative.

The preceding proposition is founded upon the judgment in *Bull v. Vardy* (d); wherein the testator devised to his wife several houses, but did not give her any interest in the general produce of his estate, and then proceeded thus: "I further *empower* my wife to give away at her death 1,000*l.*; 100*l.* to *Elizabeth Turner*, 100*l.* to Mrs. *Bennett*, and 800*l.* to be disposed of by her will; and in a subsequent part of his will, he declared, that his legatees were to take nothing till after the death of his wife and sisters; and then, after giving various small legacies, he gave the residue to two persons named *Crowe*.

(c) 1 Russ. 511, *in notis.*

(d) 1 Ves. jun. 270.

Recommendation not raising trusts.

The wife died without making any appointment. A bill filed against her executor claimed the 100*l.* which she had power to leave to *Elizabeth Turner*. But Lord Chief Baron *Eyre* decided that it was a mere naked authority in the testator's wife; consequently, that the plaintiff was not entitled: and he accordingly dismissed the bill. In the course of his judgment, he stated the rule, as the result of preceding cases, to be, "that where the absolute interest is given to one, with any expression that the devisee shall dispose of the whole or a part, to a particular person, that does not amount to a devise properly, but will raise a trust for that purpose, which the Court will execute after the death of the devisee:" and his Lordship further remarked, "For the defendant it was truly observed, that this doctrine could not affect the present case, because the wife had not only no absolute interest in the 100*l.*, but none at all; so there is nothing to raise a trust. The devise, therefore, to her is a naked authority merely, which the principle of these cases (*e*) does not touch. From some of these cases, this doctrine also arises, which is nearer to the present case; that a devise to one for life, or absolutely, upon the face of it, with directions that he shall dispose of it to another at his death, shall operate as an immediate devise, without any such disposition."

The reader will observe in the preceding case, that, in order to render the words an implied trust, the word *empower* must be understood to be imperative, which does not appear to have been the testator's intention, particularly when it is connected with two considerations; *first*, that in regard to the 800*l.* the testator does not mention any objects, so that with respect to that, the idea of a trust is inadmissible; and *secondly*, from the consideration that, if it were his intention that *E. Turner* and Mrs. *Bennett* should take at all events, why did he bequeath to them differently from all his other legatees.

The next case is *Meggison v. Moore* (*f*), wherein *Lawrence Holker* devised all his real estates, after the decease of his mother, to his sister *Catherine Thorpe*, for life, with remainder to her children, in such manner as she should by deed or will appoint; and in default thereof, to all her children in fee, as tenants in common. By one of five codicils, the testator directed the residue of his personal estate to be laid out in the purchase of

(*e*) Alluding to the cases which form part of the class considered in the *first* sub-division of the present section.

(*f*) 2 Ves. jun. 630.

freehold lands; and proceeded thus: "I *recommend* my sister to settle and convey, or join with her husband in settling and conveying, all my estates and property, which she may derive from me after my decease, to the use of her two daughters for their lives, in such parts, shares and proportions, as she shall approve, with remainder to their respective issue; and in default of issue of either of them, with cross remainders to the issue of the other, with usual powers and clauses in strict settlement. *C. Thorpe*, the testator's sister, died, leaving two children, *Meggison* and *Potts*, without making any appointment. The Court being of opinion, that the will was republished, instead of being revoked by the codicil, the question, so far as relates to the point in consideration, was, whether the children of the testator's sister were entitled to the lands to be purchased with his residuary personal estate, as tenants in common in fee, or for their lives only, with remainder to their issue in strict settlement? If they were entitled in fee, they must claim under the limitations in the republished will; if for their lives only, then the words of recommendation in the codicil must be considered imperative, and amounting to a devise, independent of any settlement by their mother. Lord *Loughborough*, C., was of opinion, that the recommendation upon the general intention of the testator was not intended by him to be imperative upon his sister, but merely discretionary, and that as she had not exercised the discretion, the Court could not: and accordingly, his Lordship decided that the children were entitled to the lands directed to be purchased, in moieties, in fee.

Recommendation not raising trusts.

In *Paul v. Compton* (g), the doctrine under consideration was noticed, but the case did not call for any decision, upon the effect of words of recommendation there. The question there was, whether a grandchild, born after the death of the testator's widow, to whom the recommendation was given, was an object to take any interest by an exercise of the power of selection; and Lord *Eldon* decided in the negative. His Lordship's observations on the doctrine discussed in the present section, were as follow: "The cases upon words of recommendation have, I take it, now settled this rule; whether the terms are those of recommendation, or precatory, or expressing hope, or that the testator has no doubt, if the objects, with regard to whom such terms are used, are certain, and the subjects of property to be given are also certain, the words are considered imperative, and create a trust.

(g) 8 Ves. 375.

Recommendation not raising trusts.

But the questions are very different, whether the words of a will create a trust or a power. If the words are imperative, they do not create a power, but they execute themselves by force of the terms."

In the case of *Robinson v. Smith* (h), the testator, after giving several pecuniary legacies, proceeded thus: I give all my remaining property of any kind to Miss *Elizabeth Smith*, under the following restrictions; the interest of as much consols as will produce 200*l. per annum*, after the legacy duty is paid, to her free pleasure: *of course she will give it, or Ashtead*, to her sisters, if she marries, and they marry not; and provided Mr. *Ince* should marry and have children, she will give as much *consols* as will produce 500*l. per annum*, to her niece, *Hester Smith*, and afterwards divide the remaining property, and my estates which I shall leave her by codicil, among the three brothers and two sisters, share and share alike, unless any one shall be afflicted with vice or prodigality, in her own opinion, not in that of any one else, let him or her not have a shilling of what she can leave him or her." Sir *John Leach*, V. C., observed, that there was no doubt that the residuary legatee had an absolute discretion to exclude any, and perhaps all of her brothers and sisters, from any share in this property: but the words of the will gave to the three brothers and two sisters a vested interest until divested by exclusion. The case differed nothing from an interest vested in the brothers and sisters, subject to be defeated by a power of appointment in the residuary legatee. Unless the power of appointment in the one case, or power of exclusion in the other, were exercised, the brothers and sisters would take, and the fund must in the meantime have been secured.

In *Meredith v. Heneage* (i), *John Walter Heneage* devised and bequeathed all his real and personal estate to his wife, her heirs, executors, administrators, and assigns for ever, adding the following words, "And I earnestly recommend to my said wife, the care and protection of my affectionate friend *Arabella Anne Caroline Jenny Pigott*, most heartily beseeching my said wife that she will permit and suffer the said *A. A. C. J. Pigott* to live and reside with her, and that she will afford to the said *A. A. C. J. Pigott* the same kind attention and tenderness which has been always

(h) 6 Madd. 194; *Abraham v. Alman*, 1 Russ. 509; see also *Lechmere v. Lavie*, 2 Myl. & K. 197.

(i) 1 Sim. 542; 10 Price, 230, 306; see also *Benson v. Whittam*,

5 Sim. 22; *Hoy v. Master*, 6 Ib. 568; *Payne, ex parte*, 2 Yo. & Coll. (E.), 636; *White v. Briggs*, 15 Law J. 182; *Knight v. Knight*, *Pope v. Pope*, *Young v. Martin*, *ubi supra*.

shewn her in my lifetime. And I seriously and warmly entreat my said wife, at her decease, to settle and assure, to two trustees, such part of my real estate as she shall think proper, for the special purpose of securing to the said *A. A. C. J. Pigott*, during her natural life, (in case she survives my said wife, but not otherwise) such an income as will enable the said *A. A. C. J. Pigott*, to enjoy all those comforts of life which she has hitherto been used and accustomed to, leaving the amount of such income to the entire discretion of my said wife. And I have devised and bequeathed the whole of my said real and personal estate, hereinbefore particularly set forth, unto my said dear wife (and which she must acknowledge not to be inconsiderable), unfettered and unlimited, in full confidence, and with the firmest persuasion that, in her future disposition and distribution thereof, she will distinguish the heirs of my late father, by devising and bequeathing the whole of my said estate, together and entire, to such of my said father's heirs as she may think best deserves her preference. And I constitute and appoint her, my said dear wife, the said *Arabella Walker Heneage*, sole executrix of this my will." Mrs. *Heneage* devised her real estate to trustees for a term of five hundred years for securing 500*l.* to *A. A. C. J. Pigott*, 700*l.* to the executors, and an annuity of 1,000*l.* to *A. A. C. J. Pigott*, and subject thereto to *George Heneage Walker Heneage* and to his brothers in remainder in strict settlement with divers remainders over. She bequeathed the residue of her personal estate to trustees upon trust for *A. A. C. J. Pigott* and *Jenny Pigott* for life equally and after their deaths in trust for other persons. *G. H. W. Heneage* and his surviving brothers and sisters filed their bill in the Court of Exchequer, insisting that Mrs. *Heneage* took an estate in fee simple under her husband's will and that she had power to devise them as she had done by her will, and praying that the trusts thereof might be carried into execution. The co-heirs of the testator contended that Mrs. *Heneage* took an estate for life only in the real and personal estate of her husband, with a trust or power to devise and bequeath the same together and entire at her death to such of the heirs of the testator's father as she thought best, and that not having so done the devises and bequests in her will were void, except those in favour of *A. A. C. J. Pigott*, and that the co-heirs were entitled either to the real and personal estate or to the real estate only, and the testator's next of kin to the personal estate. The Court of Exchequer directed the trusts of Mrs. *Heneage*'s will to be carried into execution. *Alexander, C. B.*, and *Garrow, B.*, being of opinion that the

Recommendation not raising trusts.

Recommendation not raising trusts.

language of her husband's will was *not imperative*, and that the persons to take were not thereby *sufficiently pointed out* by him. *Graham, B.*, and *Wood, B.*, were of opinion that the trust was created by the will of Mr. *Heneage*, but the latter Judge thought that the disposition of estates made by the widow was a due execution of the trusts. From this decree the co-heirs at law appealed to the House of Lords, who confirmed the decree of the Court of Exchequer.

In *Wood v. Cox (j)*, the testatrix devised and bequeathed all her real and personal estate whatsoever to Sir *G. M. Cox*, his heirs, executors, administrators and assigns, for his and their own use and benefit, trusting and wholly confiding in his honour, that he will act in strict conformity with her wishes, and she appointed him and another person executors. On the same day the testatrix executed a testamentary paper giving several annuities and legacies, and among others 100*l.* to the plaintiff who was her father and sole next of kin; to the testamentary paper were annexed the words "such is the will of *Sarah Crompton*," in the testatrix's handwriting. The question was, whether the residue subject to the annuities and legacies was given beneficially to Sir *G. Cox*, or whether he took it as a trustee for the next of kin. Lord *Langdale, M. R.*, after considerable hesitation decided in favour of the latter; his Lordship forcibly observed that the testatrix did not use the words "for his own use and benefit" in their ordinary sense, for the subsequent words shewed that he should not take the whole of it in that sense; that very possibly the testatrix intended Sir *George Cox* should take the surplus after paying her debts and legacies, but that if such were her intention it was not sufficiently apparent from the expressions used. This judgment was reversed upon appeal by Lord *Cottenham, C. (k)*, who was of opinion that it was not a gift upon trust, but a gift subject to a charge, and that Sir *G. M. Cox* was entitled beneficially.

In *Shaw v. Lawless (l)*, the testator devised an estate for life to his son *J. H.*, without impeachment of waste; and gave a small legacy to *B.*, in token of his esteem, adding it was his particular *desire* that his executors and trustees, should continue the said *B.* in the receipt and management of his estate, and should likewise employ and retain him in the receipt, agency and management of

(j) 1 Keen, 317.

(k) 2 Myl. & Cr. 684; see also *Bardswell v. Bardswell*, 9 Sim. 319; *Knight v. Knight*, 3 Beav. 148, per Lord *Langdale, M. R.* aff.; 11 Cl.

& F. 513; *Pope v. Pope*, 10 Sim. 1; *Young v. Martin*, 2 Yo. & Coll. (C.), 582; *Winch v. Brutton*, 14 Sim. 379. (l) 5 Cl. & F. 129, and see *Finden v. Stephens*, 2 Phil. 142.

the rents and issues of all such other lands and premises as should be purchased and settled in pursuance of the directions thereafter contained, at the usual fees allowed to agents. Lord *Plunket* had given his opinion that the expressions in the bequest were not imperative, and did not create a trust in favour of *B.* (m): but Sir *Edward Sugden*, C., upon a rehearing, decided that a trust was created, reversing the judgment of Lord *Plunket* (n): upon appeal the House of Lords reversed Sir *Edward Sugden's* decision, confirming that of Lord *Plunket*. Lord *Cottenham*, C., in delivering his opinion to the House, referred to *Hibbert v. Hibbert* (o), cited in the argument, which his Lordship considered very distinguishable, the intention in that case clearly appearing in favour of the consignee of the West Indian estate of the testator. His Lordship adverted to the absurd consequences which would ensue, if the trust were sustained, and inferred that such could not be the intention of the testator, as those consequences were incompatible with the privileges of ownership given to the tenant for life. *See Johnston v. Rawlins 12 Jurist 769*

Recommendation not raising trusts.

Where property not distinctly ascertained.

2. In the next place, we shall produce some instances, wherein the property, in respect of which the recommendation is given, is not distinctly ascertained.

2. Where property not distinctly ascertained.

The subject or property is considered uncertain, when the amount is made to depend on a contingency, such as the will of the first taker, in which case the trust by implication cannot be raised, but the first taker will be entitled to the bequest absolutely.

Thus, in *Attorney General ex Rel. Goldsmiths' Company v. Hall* (p), (cited in *Flanders v. Clark* (q), the case next stated) the testator gave to his son his personal estate; and if he died without issue, then so much *as shall remain*, to the *Goldsmiths' Company*. The son died without issue, and it was insisted, that he had only an usufructuary interest, and so to go over: but it was determined by Lord *King*, that he had the absolute property, and therefore the devise over was void; for he had power to spend the whole, which was an absolute gift.

In *Flanders v. Clark*, *Margaret Flanders* bequeathed 150*l.* to her son, the principal to be paid by her executors, at such time

(m) Lloyd & Gould Rep. 1835, Tem. Sug. 164, n.

(n) Ib. 154.

(o) 3 Mer. 681, and see *Williams v. Corbet*, 8 Sim. 349.

(p) Fitzgibbon's Rep. 314; see also *Bourn v. Gibbs*, 1 R. & M. 614, *infra*, 1436.

(q) 1 Ves. sen. 9.

Recommendation not raising trusts.

Where property not distinctly ascertained,

and in such proportions as they pleased, provided that he should not dispose of it to any present or future wife; but if her son died without leaving issue, then that it should revert to the testatrix's family, and interest at the rate of five *per cent.* should be paid by her executors, for what should be in their hands till the whole should be paid. The surviving executor directed the legacy to be paid to the son with interest after a certain time, which had expired. The question was, whether the son was entitled for life only, with an implied trust after his death, without leaving issue, for the testatrix's family; or whether he was entitled absolutely, which involved the question, whether the power was well executed by the surviving executor. Lord *Hardwicke* was of opinion that it was; that if the clause rested upon the first part, he should have thought the former construction correct; but, taking the latter part of the clause into consideration, the direction to the executor to pay interest till the whole was paid, shewed the testatrix meant it for a personal benefit; and the legacy was accordingly decreed to the son.

Again, in *Bland v. Bland* (*r*), the testatrix gave her manor of *W.* and all other her real and personal estates to her son *B.* his heirs, executors, administrators and assigns, subject to the following clause; "and it is my earnest request to my son, in case of failure of issue of his body, that he would, in his lifetime, settle the said estate, or so much thereof as he should stand seised of at his death, that the same may come to and be enjoyed by my daughter, and the heirs of her body," with other remainders over: and Lord *Hardwicke*, held this clause not to raise a trust for the daughter, &c., as the words "so much as he should die seised of," gave the son the absolute ownership; and the other expressions amounted to nothing more than words of recommendation, leaving it to the discretion of the party, whether he would comply with her request or not.

Again, in *Le Maitre v. Bannister* (*s*), the testatrix gave her fortune to *B.*, and if he should die without issue, she recommended it to him to do justice to *A.* and her children, if he thought them worthy of it; but if any unforeseen accident should make the whole or any part acceptable or serviceable to himself, he might dispose of it as he should think proper: and this was held no trust for *A.* and her children.

So in *Wynne v. Hawkins* (*t*), the words of the will were, "and

(*r*) *Pre. Ch. in notis* ed. Finch, 201; 6 *Cru. Dig.* 159, edit. 4.

(*s*) *Pre. Ch.* 201, *in notis*.

(*t*) 1 *Bro. C. C.* 179.

as I have lately received the melancholy account of the death of my dear son *William Wynne*, at *Bengal*, who has left a widow and two small children, and I am informed he died worth five times the fortune I shall leave behind me, which will be a handsome provision; and as I shall leave behind me, over and above the legacies before given, only sufficient for a decent maintenance for my loving wife, *Mary Wynne*, by whose prudence and economy, I have saved the greatest part of the fortune I shall die possessed of, not doubting but that she will dispose of *what shall be left* at her death, to our two grandchildren." All the residue of the testator's personal estate he bequeathed to his wife, whom he appointed sole executrix. The question was, whether the wife was entitled to the residue absolutely, or a trust was created by the above clause, for the grandchildren after her death; and Lord *Thurlow*, C., was of opinion, there was no trust: observing that, if the intention were clear, what was to be given, and to whom, he should think the words *not doubting* strong enough; but where, in point of context, it is uncertain what property was to be given, and to whom, the words are not sufficient, because it is doubtful what is the confidence the testator has reposed; and where that does not appear the scale leans to the presumption, that he meant to give the whole to the first taker.

Recommendation not raising trusts.

Where property not distinctly ascertained.

Again, in *Strange v. Barnard* (u), *Susannah Strange* bequeathed (by virtue of a power) as follows: "I bewill to my husband, *Thomas Strange*, the sum of 300*l.* new joint stock annuities, for his sole use, and all that is remaining in the stock, that he has not necessary use for, to be equally divided between my brother *John Crapps*, and sister *Wickenden*, and sister *Banden*." The question was, whether these words raised a trust for the testatrix's brother and sisters, after the husband's death? and it was determined in the negative; and that the husband was entitled to the 300*l.* absolutely.

Again, in *Pushman v. Filliter* (x), *John Pushman* bequeathed the residue of his personal estate unto his wife *Mary*, desiring her to provide for his daughter *Ann* out of the same, so long as she, his wife, should live, and at her death to dispose of *what should be left* among his children, in such manner as she should judge most proper. The question was, whether these words raised a trust for the children, after the death of the mother: and it was urged that the words, "what should be left," referred

(u) 2 Bro. C. C. 586.

(x) 3 Ves. 7.

Recommendation not raising trusts.

Where property not distinctly ascertained.

to the provision to be made for *Ann*, and that the testator intended what should then remain should go to the other children; so that the fund to go over to them was certain; but the Court thought otherwise; Lord *Loughborough*, C., deciding that it was an absolute gift to the wife, clothed only with a trust for *Ann*, who, his Lordship admitted, could have filed a bill, but no one else. In the course of his judgment, his Lordship made a similar observation to that of Lord *Thurlow* in *Wynne v. Hawkins*, namely, that if a bill had been filed during the wife's lifetime, the Court could not have impounded the property; and after appropriating a sufficient part for *Ann*, have directed that the mother should have the rest for life only, and that it should go over after her decease.

In this place, it will be proper to notice the case of *Cunliffe v. Cunliffe* (y). There the testator bequeathed his moiety of certain sugar-houses and stock in trade in *Chester*, subject to certain charges, to his son *Ellis Cunliffe*; but if his son happened to die without a son born in his lifetime, or in due time after his death, then the testator recommended it to him to give and devise the sugar-houses and joint stock in trade there to his brother *Robert*. The question was, whether this was a trust or devise in favour of *Robert*, after the death of *Ellis*; and Lords Commissioners *Smythe* and *Aston* were of opinion that it was not.

In *Malim v. Keighley* (z), Lord *Loughborough* assigned the reason of that opinion as follows: "I have looked into the note I have of *Cunliffe v. Cunliffe*. It brings the principle to my recollection, for I am perfectly satisfied even upon my note, which is not much longer than that in *Ambler*, that the ground principally argued, and upon which the decision turned, was, that *Ellis* had the absolute property of the sugar-houses, as well as of the other stock in trade. The point on which the decision turned must have been, that the absolute property in the sugar-houses being given, that could not be controlled by any words added, intimating a desire in what manner it should be disposed of by him. It turned on the nature of the property, not upon the critical interpretation of the words."

In *Pushman v. Filliter*, before stated, Lord *Loughborough* observes upon *Cunliffe v. Cunliffe* thus: "The Lord Chancellor, in *Malim v. Keighley*, seems to think the Lords Commissioners

(y) Amb. 686.

(z) 2 Ves. jun. 532, *supra*, p. 1420.

did not intend to break in upon the rule; I cannot but still think that it is overruled by *Pierson v. Garnet*."

Recommendation not raising trusts.

It will appear to the reader from the cases before adduced on the present subject, that the authority of *Cunliffe v. Cunliffe* can only be supported on the principle stated by Lord *Loughborough*: for *Pierson v. Garnet*, and the other cases before cited, have settled beyond controversy, that where the property and object are certain, words of recommendation or desire will amount to a trust or devise.

Where property not distinctly ascertained.

In *Wilson v. Major (a)*, *Thomas Major* bequeathed the residue of his personal estate to his wife *Dorothy* for her maintenance, upon full trust and confidence in her justice and equity, that at her decease she would make a proper distribution of what effects *might be left*, in money, goods, or otherwise, to his children, accounting what they had already received in money or effects as part of their shares; and he appointed his wife executrix. Sir *William Grant*, M. R., decreed the widow absolutely entitled to the personal estate.

In *Eade v. Eade (b)*, *George Eade* bequeathed the residue of his personal estate to his wife, *Alice Eade Eade* (the plaintiff), "requesting that she would, at her death, leave 200*l.* to each of the Miss *Nortons*, and leave the remainder of her property to his nephews, *George* and *William Eade*, in such proportions as she thought proper." The questions were, whether the Miss *Nortons* were entitled, as vested interests in them, to the legacy of 200*l.* on the death of the plaintiff; and whether *George* and *William Eade* were entitled to the remainder of the testator's property after the death of the plaintiff; or whether the plaintiff was entitled to the property absolutely? Sir *John Leach*, V. C., was of opinion, that the Miss *Nortons* were clearly entitled to the legacies of 200*l.*; and that if the testator had requested his wife to leave the remainder of *his* property to *George* and *William Eade*, there would have been a clear trust in their favour, because the remainder of the testator's property could have been ascertained; but his Honor observed, he could not say, that by the remainder of *her* property the testator meant the remainder of *his* property; and that the testator having left his wife at liberty to deal with the remainder of his estate as she pleased, his request, as to the uncertain property of which she might be possessed at her death, would not create a trust.

(a) 11 Ves. 205; see also *Bull v. Kingston*, 1 Meriv. 314. (b) 5 Madd. 118.

Recommendation not raising trusts.

Where property not distinctly ascertained.

In *Curtis v. Rippon* (d), *William Curtis*, by will, appointed his wife *Elizabeth* guardian of all his children by his first and second marriage; and then bequeathed thus: "I give, devise, and bequeath all my real and personal estates and effects whatsoever, whereof I have any disposing power, to my said wife *Elizabeth*, her heirs, executors, and administrators; trusting that she will, in fear of God, and in love to the children committed to her care, make such use of it as shall be for her own and their spiritual and temporal good, remembering always, according to circumstances, the church of God and the poor." The wife died, and made her will; and upon a bill filed by legatees under her will, for an account, &c., the question was, whether the words of the testator's will created a trust for the children, or gave his wife the absolute disposal; and Sir *John Leach*, V. C., held the wife absolutely entitled; there being no ascertained part of the property provided for the children, and the wife being at liberty, at her pleasure, to diminish the capital either to the church or the poor; that the plain intent was to leave the children dependent on the wife.

In *Abraham v. Alman* (e), the testator bequeathed to his son *Isaac* the sum of 60*l.* *per annum* for ever; "also to provide for the two daughters of my child *Hannah Embden*, namely, *Sarah Embden* and *Esther Embden*. The remainder of my property to the two children of my daughter *Sukey Alman*." The question was, whether the words of the bequest created a trust either on the son's annuity or on the remainder of the testator's property. Lord *Gifford* decided in the negative, observing that the testator meant no doubt to make a provision for the children of *Hannah*, but unfortunately had not sufficiently expressed his purpose; and that all the testator had said respecting this intended bounty was so uncertain that it was impossible for the Court to decree any provision for the children of *Hannah Embden*.

In *Bourn v. Gibbs* (f), a testator bequeathed the residue of his personal property to his wife for her own use and to be at her absolute disposal, adding a proviso that if not disposed of by her in her lifetime or by her will, it should go over to his nephews and niece equally. The wife made a will disposing of all her personal estate, but without reference to her husband's

(d) 5 Mad. 434.

(e) 1 Russ. 509; see also *Sale v.*

Moore, *infra* next page, and *Meredith v. Heneage*, *supra*, 1428.

(f) 1 Russ. & M. 614.

will. Sir *John Leach*, M. R., held that the widow took an absolute interest, and that the property passed by her will.

Recommendation not raising trusts.

3. We lastly advert to the cases, wherein the objects of the recommendation are not distinctly ascertained; for where this is the case, one of the requisite ingredients to raise a trust by implication is wanting.

3. Where objects not distinctly ascertained.

Thus in *Harland v. Trigg* (g), the plaintiff's father settled by will his freehold property upon his sons *Philip*, *John*, and *Richard* (the plaintiff), in strict settlement, with other remainders over. After his death, *Philip*, his eldest son, entered; and being possessed of leasehold estates in the parish of *Sutton*, some for lives, others for years, he devised his leaseholds for lives to the trustees of his father's will to the same uses to which the lands devised by his father's will were limited, so far as he could by law: and then followed this clause: "And all other my leasehold estates in the parish or township of *Sutton*, I give to my brother, *John Harland*, for ever, hoping he will continue them in the family." After *Philip's* death, *John*, the second son, entered, and also died, having first bequeathed these leaseholds for years to his widow. The question was, whether *John* had a right to bequeath the leaseholds under the words of the above clause in his brother's will, which depended on a further question, whether the effect of that clause was to subject them to the uses of the father's will. It was contended for the plaintiff, that *John* was entitled for life only, and that the words in the will of *Philip* were sufficient to raise a trust. On the other hand it was insisted, for the widow and legatee of *John*, that by the word "*family*," *Philip* had not pointed out any particular branch of the family; that in the devise of the leaseholds for lives, he had given the lands he meant to go together, to trustees, in accurate language, so that if he meant the other leasehold property to be subject to similar trusts, he would have adopted similar words; and Lord *Thurlow*, C., was of the same opinion: and he thought the words hoping, &c. were to be considered precatory, and not imperative; but that had they been annexed to precise and direct objects, they would have been sufficient to raise a trust. His Lordship accordingly dismissed the bill against the widow and legatee of *John*.

In the case of *Sale v. Moore* (h), the testator bequeathed to

(g) 1 Bro. C. C. 142; see also *Wright v. Athyns*, 1 Turn. 143.

Sargon, 2 Keen, 255; 3 Myl. & Cr. 507,

(h) 1 Sim. 534; see also *Stubbs v.*

Recommendation not raising trusts.

Where objects not distinctly ascertained.

his wife, *Mary Moore*, all "his worldly substance whatsoever, upon trust for the following purposes; 1st, to pay his debts and funeral expenses." The testator then gave two legacies, one of which was to his sister, *Fanny Moore*, and then proceeded thus: "my brother being in affluent circumstances, and my eldest sister being already well provided for by me, will, I trust, be considered by them as a sufficient reason for my not leaving them anything in this my will, as I could not do it without taking from my wife's property, who is more in need of it. The remainder of what I die possessed of, after payment of the aforesaid debts and legacies, I leave to my dear wife aforesaid, *recommending to her and not doubting*, as she has no relations of her own family, but that she will *consider my near relations*, should she survive me, as I should consider them myself in case I should survive her. And I hereby appoint my said wife sole executrix of this my will." The testator died in 1812, leaving *John Moore*, *Fanny Moore*, and *Mary Moore*, his brother and sisters, his only next of kin. The testator's widow, by her will, in 1822, (which did not refer to the will of the testator), gave legacies to the testator's brother and other persons, and annuities to the sisters, and died shortly after the date of her will. It was insisted, on behalf of the testator's brother and sisters, that his widow only took a life interest with a power of appointment among the testator's near relations, and that they were entitled under the constructive trust in their favour, as his next of kin, subject to the appointment in favour of *Mary Moore*, by the widow. Sir *Anthony Hart*, V. C., decided in the negative, on the ground that such trust could not be implied as the objects were uncertain, it not appearing whether the testator meant relations at his own or his wife's death; his Honor was also of opinion that the testator had pointed out every trust that he intended should fix upon the property, having expressly declared his intention not to take anything from his wife, and that the Court could not find out how the testator would "*consider*" his relations.

Upon the subject of the present subdivision it is to be observed, that if the Court is unable to ascertain the objects of recommendation, *not* because the expressions in the will are equivocal, but because the testator has referred to some other document as specifying the objects, and that document is not forthcoming, in such a case the Court will not allow the legatee to take the legacy for his own benefit discharged from the trust (i).

(i) *Corporation of Gloucester v. Wood*, 3 Hare, 131.

SECT. VII. Of implied bequests generally.

In the preceding section we considered the cases, wherein implied trusts would be raised by words of recommendation, desire, &c.: we now proceed to the subject of implied bequests generally; and observe, that wherever a necessary and unavoidable implication arises upon the face of the will, that the legatee should have a legacy, on an event, which the testator has not accurately described, there the defect will be supplied, and the legatee shall have the benefit of such necessary implication. The following class of cases may be considered to form a branch of a subsequent section (*j*), but for the convenience of the reader, and more easy reference, it is thought advisable to arrange them in a distinct section (*k*): and

1. First we adduce instances relating to survivorship, where it was not accurately provided against. 1. Survivorship implied.

Thus in *Scott v. Bargeman* (*l*), a testator, having three daughters, directed 900*l.* to be laid out by *J. S.*, at interest, upon trust to pay his wife the interest, so long as she should continue his widow; and after her death or marriage, in trust to divide the 900*l.* equally among his three daughters, at their respective ages of twenty-one or marriage: Provided that if *all* his three daughters should die before their legacies should become payable, then the mother should have the *whole*. The testator's widow married the defendant; the two eldest daughters died under age, and unmarried; and the youngest attained twenty-one. The question being, whether she was entitled to the whole, or only part of the 900*l.*, Lord *Macclesfield*, C., decided that she was entitled to the whole.

Again in *Harman v. Dickenson* (*m*), the testator made a bequest in favour of his two daughters; and, if one should die *without* issue, then to the *surviving daughter* and her issue. One of the daughters married, and died, *leaving* issue; and then the unmarried daughter died; and Lord *Thurlow*, C., determined that the money went to the issue of the married daughter, although she did not survive her sister.

To these the case of *Hill v. Smith* (*n*), may be added. There *William Hill* bequeathed to his son *William* 3,000*l.* three *per*

(*j*) Sect. ix. *post*.

(*k*) *Vide ante*, p. 583.

(*l*) 2 P. Wms. 68.

(*m*) 1 Bro. C. C. 91.

(*n*) 1 Swanst. 195.

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cent. consols and reduced, the interest of which was to be appropriated to his maintenance and support, under the direction of the trustees named in the will, whom the testator appointed trustees of his son, until he attained twenty-four. The testator then bequeathed the residue of his personal estate to be sold, and the produce to be invested in the funds, and the interest thereof paid to his wife *Betsy* for life, if she remained a widow; and after her decease or marriage, he bequeathed the said stock and interest arising from his residuary estate unto any child or children he might have by his wife *Betsy*, equally to be divided between them that attained twenty-one; the survivor of his children to possess what was there bequeathed to the other; and the testator added; "but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I then further will and bequeath unto the children of my aforesaid sister, *Ann Pashley*, widow, by her late husband *Robert Pashley*, the 3,000*l.* stock in the three *per cent.* consols and reduced, left to my son *William* on their attaining twenty-one, equally, &c.; the interest on which my said sister may receive during her natural life, &c." At the date of his will, the testator had two children, the plaintiff his only son by a former wife, and by his second wife a son, who died in infancy during the testator's life. After the death of the testator and his widow, the plaintiff, having attained twenty-four, filed his bill against the executors for a transfer of the 3,000*l.* stock, and the question was, whether, in the events which had happened, he was entitled; the children of Mrs. *Pashley* contending that, in the event of the testator's leaving no children by his second wife, who should attain twenty-one, the provision for his son by his first wife was to be divested. But Sir *Thomas Plumer*, M. R., thought otherwise, being of opinion that, although the intention was not accurately expressed, the testator having bequeathed legacies to each class of his descendants, intended that the survivor should take the whole, in preference to collaterals: and his Honor accordingly decreed the plaintiff entitled to the 3,000*l.* stock, and the residue of the testator's personal estate.

In *Doyme v. Cartwright* (o), real and personal property was given to trustees, upon trust to pay the annual income to the testator's two nieces, in equal moieties during their lives; and after the death of either of them *unmarried*, then upon trust to pay the whole income to the survivor during her life. One of the

nieces died, *having married*. Sir *K. Bruce*, V. C., held upon the whole scope of the will, that the surviving niece was entitled to the income.

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Exception.

In the preceding cases the inference of intention was considered by the Courts as clear in favour of survivorship; but, unless it be clear, although there may be some ground of inference, the implication will not be admitted.

The case of *Bargrave v. Whitwicke* (*p*) is an instance of this. There the testator bequeathed to his two daughters 600*l.* *a piece, to be paid at twenty-one*; and he gave the *residue* of his personal estate to his son; and declared that if *either* of his said children should die in their minority, the survivors should be heirs in equal proportion. The son died young: and the Court thought that the *residue* was not subject to any contingency or survivorship, but the interest in it vested in the surviving daughters, whether of age, or not; and confined the words divesting the interest of a child dying under twenty-one in favour of the survivors to the two sums of 600*l.* given to the daughters.

In *Taniere v. Pearkes* (*q*), where the gift in a French will was to *F.*, and at her death in equal portions to her two daughters, “*à leur décès, à leurs enfans*,” and one of the daughters died without children, it was held, that the children of the surviving daughter took only their mother’s share; there being no words, which could carry the daughter’s share to the surviving daughter or her children (*r*).

2. Of instances of implied bequests, where a provision is given out of a fund to a legatee, *until* a certain event; (*e. g.*) until the age of twenty-one, or marriage; and then *no further bequest* is added.

2. Where provision is made out of a fund for legatee, until an event, and nothing further added.

Thus in *Peat v. Powell* (*s*), *Giles Powell* gave the residue of his real and personal estate to his executors, in trust for his younger son *Giles*, till he should attain twenty-one; and then directed that the trust should cease. *Giles* the son attained twenty-one; and Lord Keeper *Henley* decided that the testator intended *Giles* should take the whole beneficial interest in the residue; and that the bequest was the same, as if the testator had said, “I give the residue of my estate to trustees in trust for *Giles* till twenty-one; and then to *Giles* and his heirs.”

(*p*) Finch. Rep. 436.

(*r*) For survivorship of life interest, see sub-div. 5, *infra*.

(*q*) 2 Sim. & Stu. 383; see also *Cooper v. Pitcher*, 4 Hare, 485, aff. by Lord Cottenham, C., Nov. 1846.

(*s*) 1 Eden, 479.

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quests.

Again in *Hale v. Beck* (t), *Elizabeth Hale* bequeathed 300*l.* to trustees in trust, after the death or second marriage of *Anne Hale*, to pay the interest to the plaintiff *Anne Hale* her daughter, an infant, in trust for her till she came to the age of twenty-two years; and Lord *Northington*, C., determined, though the legacy was expressed to be only given in trust during infancy, yet that *Anne Hale* the daughter was entitled to it absolutely.

So in *Atkinson v. Paice* (u), the testator bequeathed the sum of 1,000*l.* three *per cents.* to his executors, in trust to pay the dividends to the use of his niece *Elizabeth*, and her daughter *Ann*, during their lives, and the life of the survivor; and in the event (which happened) of *Ann Vaughan* not having lawful issue, the testator directed the stock should be transferred “*in trust to J. F. Little, till he comes of age.*” *J. F. Little* attained twenty-one in the lifetime of *Elizabeth* and *Ann Vaughan*, and died. After the death of *Elizabeth* and *Ann Vaughan*, the executrix of *J. F. Little* claimed the 1,000*l.* three *per cents.*; and the question was, whether she were so entitled, and Lord *Thurlow* determined that she was, the testator intending to give the fund to the child, and the trust given till then, was only to point out the mode.

3. Where fund given, until a certain event, and if it do not happen, fund given over, the happening of the event not provided for.

3. Of instances of implied bequests, where a provision or partial interest out of a fund is given to a legatee, until a certain event; (*e. g.*) until the legatee attain twenty-one, or marry; and if that event does *not* happen, the fund is given over, there being no express gift of the fund itself to the legatee, in case the event *does* happen. In such case the implied bequest to the legatee, in the latter event, will be supported.

Thus in *Crowder v. Clowes* (v), the testator, having created a term of years for the payment of debts and legacies, bequeathed to his niece 1,000*l.* to be paid immediately after his death, “in case she should happen to be *then* married;” but if not, then he gave the interest of the legacy to her for life, or “until she should be married; *but if she died unmarried*, he directed the legacy to lapse for the benefit of the person entitled to his real estate. By a codicil he gave to his niece 200*l.* in addition to what he had given her by the will. The niece was *unmarried* at the death of the testator, but married soon afterwards, and then claimed the legacies: and Lord *Alvanley*, M. R., decreed that

(t) 2 Eden, 229.

(u) 1 Bro. C. C. 91; *Bell's* ed. in

notis, Reg. Lib.

(v) 2 Ves. jun. 449.

they must be raised; being of opinion, that the testator meant to give her the legacies when she married; and his Lordship observed, that unless the implication were unavoidable from the testator's having given the legacy over if she died unmarried, he could not supply it.

Of implied bequests.

Fund given, until future event, the happening of which is not provided for.

Again, in *Wainewright v. Wainewright* (w), *Thomas Wainewright* bequeathed the residue of his personal estate to his executors, in trust to pay 20*l.* yearly, out of the interest, for the maintenance and education of *Thomas Wainewright*, (the testator's great nephew), until he attained twenty-one; with liberty to them at their discretion to apply 200*l.*, part of the capital, for his benefit during infancy. But if *Thomas Wainewright* died under twenty-one, then the residue, with the accumulations, was bequeathed over. The testator's great nephew attained twenty-one, and filed his bill, claiming the residue of the personal estate, contending, that, although there was not any express gift of the residue, there was a necessary implication arising from the will, that the testator intended he should be entitled to it upon attaining twenty-one. Lord *Alvanley*, being of opinion that the inference of intention was necessary and indubitable, decreed accordingly.

So also, in *Goodright v. Hoskins* (x), *John Hoskins* bequeathed certain leasehold premises unto his son, *Richard*, until his son, *Thomas*, should attain his age of twenty-one years, and no longer; but in case the said *Thomas Hoskins* should die in minority, then the testator bequeathed the said leasehold premises to *John*, or *Richard*, sons of the said *Richard Hoskins*, or either of them, attaining twenty-one: and the testator desired the said premises might be *quitted and delivered up*, as aforesaid, by his son, *Richard* accordingly. *Thomas*, the testator's grandson, upon the death of the testator, entered into possession, and attained the age of twenty-five; when the question arose, whether he was absolutely entitled, or whether the leasehold, upon *Thomas's* attaining twenty-one, became part of the undisposed residue of the testator's personal estate; and the Court were clearly of opinion, that *Thomas* was absolutely entitled; Lord *Ellenborough* observing, that there was a strong implication from the words of the will, that the testator meant *Thomas* should have the premises, when he attained twenty-one; and his Lordship particularly remarked upon the direction that the premises might be *quitted and delivered up* as aforesaid.

(w) 3 Ves. 558.

(x) 9 East, 306.

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Fund given, until future event, the happening of which is not provided for.

The rule of construction is the same in devises of real estate. In *Wight v. Cundall* (y), Lord *Ellenborough* cites the case of *Tomkins v. Tomkins*, mentioned also by Lord *Mansfield*, in *Goodtitle v. Whitby* (z), wherein the devise was to the testator's brother, in trust for his eldest son, *B.*, till he should attain twenty-one; and if he should die before twenty-one, then over; and the Court held the age of twenty-one to be no limitation of *B.*'s interest, but only a limitation of the trust during his minority; and that *B.* took the whole by implication.

4. Fund given for the purpose of a partial application only, and bequest of the surplus to the legatee implied.

4. Instance of implied bequest; the fund being directed to be paid to an individual for the purpose of making a partial application for the benefit of a third person, and no express gift of the surplus. The legatee takes the fund absolutely, subject to the trust for the partial purpose specified.

Thus, in *Hamley v. Gilbert* (a), the produce of the sale of the testatrix's real and personal estate was directed to be paid by her executors to her niece, *Elizabeth Garnett Hamley*, to be laid out and expended by her, at her discretion, for or towards the education of her son, *Francis Gilbert Hamley*, the testatrix's godson, and that she should not at any time thereafter be liable, and subject to account to her said son, or to any person whatever, for the disposal or application of such residue, or any part thereof. Among other legacies, by codicils, the testatrix gave a legacy of 200*l.* to *E. G. Hamley*. After the testatrix's death the bill was filed by *E. G. Hamley*, and her husband, claiming to be entitled to the residue, subject only to the application of such part, as she in her discretion should think fit, for her son, who was an infant. Sir *Thomas Plumer*, M. R., after remarking upon the difficulty of the case, and citing *Nevill v. Nevill* (b), *Barlow v. Grant* (c), *Barton v. Cookew* (d), and *Hammond v. Neame* (e), and observing that all of them differed from the case before him, decided that *Elizabeth Garnett Hamley* was entitled, subject to a trust to apply a part to the education of her son, which should be liberal, and so much as the Master might think proper to be set apart for that purpose.

The case of *Thurston v. Essington* (f), in some respects resem-

(y) 9 East, 404.

(z) 1 Bur. 234.

(a) 1 Jac. 354.

(b) 2 Vern. 431.

(c) 1 Vern. 255.

(d) 5 Ves. 461.

(e) 1 Swanst. 36.

(f) Dom. Proc. 27 Feb. 1727, cited by Mr. Jacob, after his report of the last case. See *Thorp v. Owen*,

bles the last: there the testator directed the residue of his personal estate to be laid out in lands by his wife, and settled upon his two sons; and directed that his wife should receive the rents and profits of all his estate until his children should attain twenty-one, and to maintain his children as she thought convenient; and when they came of age, she should not be liable to give them any account of the rents and profits received by her. The interest of the securities, during the minority of the sons, amounted to about 4,000*l*. Upon a bill filed by them for an account, it was insisted that the above clause only applied to the rents and profits of the real estate, which were about 700*l* *per annum*, and more than sufficient for their maintenance; and that all the money, without distinction of principal and interest, was directed to be laid out in lands for the benefit of the sons. But Lord *Macclesfield* dismissed the bill with costs; declaring, that the interest money was by the will given to the mother, and not to the son; which decree was affirmed on appeal to the Lords (g).

Of implied bequests.
Fund given for a partial purpose, bequest of the surplus to the legatee implied.

In *Gordon v. Rutherford* (h), before stated, for another point, the testator directed that his trade should be carried on by *William Forbes*, with a capital taken out of the testator's estate, and that *W. Forbes* should take the testator's nephew, *Donald Gordon*, under his care and protection, and educate and support him until of fit age to be apprenticed, and then to apprentice him to himself, and after his apprenticeship expired to take him into the business as copartner of one-third of the profits. It was insisted that *Forbes* was trustee of a third of the profits from the death of the testator for *D. Gordon*; but Sir *Thomas Plumer* held otherwise, that until *D. Gordon* was admitted into partnership, *Forbes* was entitled to the sole profits of the business.

In connection with the preceding cases of this subdivision, and which form part of a class cited in the note (i), it will be proper to notice another series of authorities, to which the reader is also referred (j), between which and the former, although

2 Hare, 607; *Hudson v. Bryant*, 1 Col. 681; *Thompson v. Thompson*, Id. 398, 400; *Bowden v. Laing*, 14 Sim. 113.

(g) Lords' Journals, Vol. 23, 197.

(h) 1 Turn. & R. 373, 377; see also *Berkeley v. Swinburne*, 6 Sim. 613.

(i) *Wetherell v. Wilson*, 1 Keen, 80,

supra, 1296; *Wood v. Cox*, 1 Keene, 317; *Benson v. Whittam*, 5 Sim. 22; *Hoy v. Master*, 6 Id. 568; *Payne Exparte*, 2 Yo. & Col. (E.) 636; *Thorp v. Owen*, 2 Hare, 607; *Costobadie v. Costobadie*, 11 Jur. 345.

(j) *Broad v. Bevan*, 1 Russ. 511, n. *supra*, 1425; *Woods v. Woods*, 1 Myl. & C. 401; *Wood v. Cox*,

Of implied bequests.

Fund given for a partial purpose, bequest of the surplus to the legatee implied.

they are in some respects allied, a clear distinction has been established.

In the former class the testator, with the gift, assigns a motive in which he contemplates a benefit to third persons, but not in such terms as to impress the gift with a *trust* in their favour; as where a legacy is given to *A.*, the better to enable him to pay his debts or to maintain his children, in which case the gift is absolute to the legatee. But in the latter class of cases referred to, the gift is accompanied with an express trust, or words of desire or confidence, amounting to an implied trust, that the legatee would apply the fund, either in whole or in part, in favour of third persons; as where a legacy is given to *B.* upon trust, or confiding, or relying upon him, that he will thereout provide for the maintenance and education of his children. In this latter bequest the children of *B.* will have such a right in the fund, as a Court of Equity will enforce against their parent, and that in favour of adults. The distinction above stated is clearly recognized in many of the authorities referred to; and the apparent discrepancy of some of them may be attributed not to any difference of opinion respecting the principles upon which the distinction is founded, but upon the difficulty of applying those acknowledged principles: and Judges have felt some embarrassment in deciding, whether the language of testators merely expressed a motive for the gift, or impressed upon it a *trust*, for the due performance of which the primary legatee was responsible to the ulterior legatees, and amenable to the jurisdiction of a Court of Equity.

5. Life interests implied.

5. Of instances of life interests implied.

In *Hammond v. Neame* (*k*), *Austin Neame* bequeathed stock to a trustee, upon trust to pay the yearly dividends into the hands of the testator's niece, *Mary Hills Hammond*, for and towards the maintenance, education, and bringing up of all and every the child and children of the said *M. H. Hammond*, until he, she or they should attain twenty-one, and to transfer the stock

1 Keen, 317; as reversed 2 Myl. & Cr. 684, *supra*, 1430; *Gilbert v. Bennett*, 10 Sim. 371; *Wood v. Richardson*, 4 Beav. 174; *Pratt v. Church*, Id. 177; *Raikes v. Ward*, 1 Hare, 445; *Crockett v. Crockett*, 1 Hare, 451; 5 Ib. 326; *Longmore*

v. Elcum, 2 Yo. & Coll. (C.) 363; *Leach v. Leach*, 13 Sim. 304; *Thorp v. Owen*, 2 Hare, 607; *Conolly v. Farrell*, 8 Beav. 347.

(*k*) 1 Swanst. 35; see Sir *Thomas Plumer's* observations on this case in *Hamley v. Gilbert*, 1 Jac. 359.

unto and among them equally: and for default of such issue, upon trust to transfer the same unto and among the testator's other nephews and nieces (describing them), living at the decease of *M. H. Hammond*; and the testator provided that the first half-yearly interest of the said stock next after his (testator's) decease should go to his residuary legatee, *Thomas Neame*. Upon the death of the testator, his niece, *M. H. Hammond*, had not any children, but claimed the dividends of the stock, after the first half-year, during her life, or until she should have a child who should attain twenty-one. It was contended on her behalf, that she and her children (only through her) were the objects of the testator's bounty; that if the payment were to be suspended until the birth of a child, the gift was contingent, and the residuary legatee would be entitled to the produce in the interim, a construction inconsistent with the bequest of the first half-year's dividend; and that the bequest over was not to take effect until her death; and that, therefore, it was apparent the testator believed that during her life the dividends were disposed of, and he had given them to no person but her. Sir *William Grant* being of that opinion, decreed the plaintiff entitled to the dividends.

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So in *Bird v. Hunsdon* (1), *John Hunsdon* bequeathed the residue of his personal estate to be invested in government security, and proceeded thus: "the interest to be paid duly to bring up and educate *Mary Morris*, daughter of, &c., and *Samuel Seabrook*, her uncle, to be her guardian; and the said *Mary Morris* to have the said interest to maintain her so long as she lives single, and no child; and when it shall please God to call her, that money shall come to my brother's and sister's children." *Mary Morris* attained twenty-one, and married *John Bird* (the plaintiff), and afterwards had a son; and the question was, whether, in the events that had happened, her interest in the residue ceased, or whether she was entitled for life. Sir *William Grant*, M. R., was of opinion she took a life interest, but not more than a life interest. His Honor seems to have considered an intent to give such life interest to be implied from the bequest of the fund on her death.

In *Blackwell v. Bull* (m), the testator directed that his trade should be carried on by his wife and son for the mutual benefit of his family: and he devised all his property, freehold as well

(1) 2 Swanst. 342, S. C.; 1 Wils. 456. (m) 1 Keen, 176.

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as personal, in trust at his wife's decease to be equally divided among his children. Lord *Langdale*, M. R., decided that by the word 'family,' the testator included his wife; and that the business was to be carried on for the common benefit of the widow and children; and as to the property not engaged in the trade, collecting the apparent intention from the whole will, his Lordship was of opinion, that the widow was entitled to a life interest in both real and personal estate (n).

In *Gregory v. Attorney General* (o), the gift was of stock to trustees upon trust to pay the interest to be divided between the testator's wife and six poor members of a chapel; and Lord *Langdale*, M. R., decided that the widow was entitled to one-seventh absolutely, but that the interest only of the other six-sevenths was from time to time payable to six poor members, the fund, as it is presumed, to form a permanent charity.

In *Acheson v. Fair* (p), the testator bequeathed 1,500*l.* in trust to the use of his father, to be disposed of by him as he by will or deed might appoint, share and share alike among the testator's brothers and the daughters of his sister. Sir *E. Sugden*, C. (L), held that the father was entitled for life.

In *Townley v. Bolton* (q), the bequest was to *A.* and *B.* her husband for their joint lives, and *after their* decease, over: Sir *John Leach*, M. R., held that *B.* surviving was entitled for life.

In *Smith v. Oakes* (r), Sir *L. Shadwell*, V. C., gave the same construction to the words "during their joint and natural lives," considering upon the whole instrument, which was an unskilfully framed settlement in *India*, that was the intention.

To the above, the case of *Crawford v. Trotter* (s) may be added; wherein a legacy of 1,000*l.* stock was bequeathed to Lady *Scott* and to her heirs (say children); and Sir *John Leach*, V. C., was of opinion, that Lady *Scott* was entitled for life, with remainder to her children; the word "heirs," which was used as synonymous with children, importing that they were to take after her death.

This case may also be considered an instance of a *remainder* being implied (t).

(n) See also *Read v. Backhouse*, 2 Russ. & M. 546; *Pearce v. Edmeades*, 3 Yo. & Coll. (E.) 246; *Malcolm v. Martin*, 3 Bro. C. C. 50; *Gilbert v. Bennett*, 10 Sim. 371.

(o) 2 Beav. 366.

(p) 3 Dru. & W. 512.

(q) 1 Myl. & K. 148; see also

M'Dermott v. Wallace, 5 Beav. 142.
(r) 14 Sim. 122.

(s) 4 Mad. 361; see *Burdett v. Young*, 9 Mod. 93; 3 Bro. P. C. 50; S. C.

(t) See also *Baker v. Newton*, 2 Beav. 112; *Knocker v. Bunbury*, 6 Bing. N. S. 306.

Lord *Thurlow*, in the case of *Newman v. Nightingale* (*t*), put the same construction upon the bequest of a legacy "to the sole use of Mrs. *Elizabeth Newman*, or of her children for ever."

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Sir *L. Shadwell* adopted the same construction in *Morse v. Morse* (*u*), there the bequest was of 5,000*l.* to his daughter *A.* and her children for their sole use and benefit; 3,000*l.* part thereof to be paid within one year after the testator's death, 2,000*l.* the residue thereof within one year after the death of the testator's wife, and he appointed *C.* and *H.* trustees of those sums for his daughter and her children. His Honor was of opinion, that it was clear the testator did not intend an immediate payment of the legacies; and that there would be an inconsistency with respect to them if the mother did not take a life interest; for then different classes of children would become entitled to different portions of the legacies, and he, therefore adopted such a construction as would make all the children participators.

It is presumed that his Honor inferred from the appointment of trustees for the legacies of *A.* and her children, that the testator did not contemplate an immediate payment of any proportion of the principal to *A.*, for in that case no trustee for her would have been necessary.

In *Vaughan v. Marquis of Headfort* (*v*), the testatrix gave 40,000*l.* three *per cent.* stock to the Marquis of Headfort and his children to be secured for their use. Sir *L. Shadwell*, V. C., held that the Marquis was entitled for life, and his children after his decease, and that that construction would let in any children that might thereafter be born.

In *Bain v. Lescher* (*w*), the testator directed the residue of his personal estate to be equally divided between certain legatees (naming them), and added that the legacies given by the will to females should be for their own benefit, and their children, and should never be subjected to the control of their respective husbands. Sir *L. Shadwell*, V. C., decided that the females took their shares for their lives for their separate use, with remainders to their children.

In *Davies v. Hopkins* (*x*) the testator bequeathed a moiety of his personal estate to his daughter for life, remainder to her children, remainder to the children of such children as should die in her lifetime; the other moiety he gave to his son for life,

(*t*) 1 Cox, 341.

Carthorn, 9 Jur. 325.

(*u*) 2 Sim. 485.

(*w*) 11 Sim. 397.

(*v*) 10 Sim. 639; see also *Ogle v.*

(*x*) 2 Beav. 276.

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remainder to his children, but if he died without issue him surviving, the testator gave the last mentioned moiety to the children of his daughter, 'in such shares and proportions, and in such manner as thereinbefore directed for the payment and division of their shares in the other moiety.' The son died without issue, and Lord *Langdale*, M. R., held that the daughter took a life interest in the second moiety.

In *Cockshott v. Cockshott* (y), the Court upon the whole will, held that the testator's widow took an estate in his real and personal property during widowhood.

The reader is referred to the ninth section (z) of the present chapter for other instances where the implication was not considered *necessary* and *indubitable*.

SECT. VIII. Of the construction of bequests void for uncertainty, *where there is a mistake in the subject* bequeathed.

Of mistake, &c.
in the subject
bequeathed.

It is essential to the validity of a bequest that the subject given be ascertainable; if, therefore, the testator, by mistake, wrongly describe the nature or quality of the gift, or omit to describe it altogether, or if he mistake the quantity, or leave the quantity or mode of distribution so indefinite that his real intention cannot be ascertained, in such cases the bequest will in general be void for uncertainty, unless by reference to other parts of the will, or by evidence *dehors* the will, the mistake can be explained and rectified.

The subject of mistake in the *name* and *description* of the legatee (a), and in the description and calculation of the fund (b), has already been considered; and, with reference to that branch of the present discussion, the reader is referred to our former observations. In this section some cases will be adduced in illustration of the above proposition, which were not before noticed, as not falling within the limit of the subject then more immediately under review.

Some additional observations were also made in a former page (c), respecting mistake in the description of a specific chattel; and to which likewise the reader is referred.

(y) 2 Coll. (C.), 432.

(z) Division 2. Exemplifying Rules 1 and 8, as stated in division 1, of the same section ix.

(a) Vol I. Chap. II. sect. xvii.; and see *Still v. Hoste*, Mad. & Geld. 192.

(b) Vol I. Chap. IV. sect. iv.

(c) Vol. I. Chap. III. sect. ii.

1. In continuation of the same subject, we observe, *first*, upon mistake in regard to the *nature* or *quality* of the subject.

Of mistake, &c.
in the subject
bequeathed.

Thus, where a testator intending to bequeath an ox, bequeaths a horse; or intending to give gold, gives apparel (*d*); these bequests will in general be void.

1. Mistake in
the nature or
quality.

But mistake in description of the *quality* of the subject will not in all cases avoid the gift; for example, a mistake in what logicians denominate the *accidens*, as where a testator having but one horse, and that *black*, gives his *white* horse to *A.* (*e*).

In the case of *Freeman v. Freeman* (*f*), the description of the *quality or nature* of the subject was by mistake *omitted* altogether. There the testator bequeathed to his daughter *A.* 550, omitting "pounds," and then gave five hundred and fifty *pounds* to his daughter *B.*: it was contended the legacy to *A.* was void for uncertainty; but Lord *Cowper*, C., decided otherwise, observing, "The subsequent bequest to the other daughter clearly shows that the testator intended 550 pounds to *A.*; and the bequest is as good, and the description as certain, as if the word '*pounds*' had been expressed."

Flint v. Hughes (*g*), is another instance of a bequest void for uncertainty of the subject intended to be given: there the testator bequeathed everything he might die possessed of to his daughter *A.* for life, "and whatever else she can transfer, to go to her daughters *B.* and *C.*" Lord *Langdale*, M. R., held the bequest to *B.* and *C.* void for uncertainty, for it was impossible to say, what was the subject intended by the words whatever she can transfer, or whether it was to pass to the daughters by a transfer from the mother, or by the operation of the will.

In a former part of this volume we have noticed instances of charitable bequests void for uncertainty, not only of the amount, but of the purpose (*h*); we here adduce an instance of a legacy void for uncertainty of the purpose intended, the legacy being to trustees for purposes referred to in an instrument which cannot be found. Thus in the case of the *Mayor of Gloucester v. Wood* (*i*), the testator made a codicil in these words: "in a codicil to my will, I gave to the Corporation of *Gloucester* 140,000*L.*, in this I wish my executors would give 60,000*L.* more to them for the same purpose as I have before named;" no other codicil was

(*d*) Touchstone, 415; Hill, ed.

(*e*) Ib. 416.

(*f*) 8 Vin. Abr. tit. Devise, p 51, pl. 22.

(*g*) 6 Beav. 342.

(*h*) Page 1237—1244.

(*i*) 3 Hare, 131; ~~1 Phil. 402~~ aff. D.P. 21 July 1847

Of mistake, &c.
in the subject
bequeathed.

In the quantity.

found containing any bequest to the corporation. Sir *J. Wigram*, V. C., held that the legacy of 60,000*l.* failed, for the uncertainty, was such as to prevent the Court from saying what the intention was.

2. In the quantity.

2. *Secondly*, of mistake or uncertainty in regard to the *quantity*.

If the bequest be of quantity, and that be left indefinite, it will be void for uncertainty; as where a testator says, "I bequeath goods, or some goods, to *A.*" (*j*).

So in *Peck v. Halsey* (*k*), where the testatrix bequeathed to her two grandchildren *A.* and *B.* some of her best linen; Sir *Joseph Jekyll*, M. R., decided that the bequest was void for uncertainty, but if it had been so much as they or the executors should choose, it would be good; yet his Honor recommended (*l*) the residuary legatee to give the legatees some of the best of the linen.

The case of *Constantine v. Constantine* (*m*), appears to be a similar instance. There the testator, after giving several legacies, bequeathed to his executors in these words: "To each of my executors I give 50*l.* as they will be benefited hereafter, when the stock comes to be transferred after the death of their aunt *Margaret Constantine*." There was no disposition of the stock alluded to after *Margaret Constantine's* death, otherwise than as the above clause might amount to a bequest of it. Sir *William Grant*, M. R., determined that the disposition of the stock after the death of *Margaret Constantine* was void for uncertainty, there being no mention of any share in which the executors should take (*n*).

In *Jerningham v. Herbert* (*o*), the testatrix bequeathed such jewels and trinkets as, at the time of her death, should be contained in her two jewel boxes, deposited by her at Messrs. *Rundell & Bridges, Ludgate Hill*, "to such persons as the same should be found to be distributed in a paper written by her within such jewel box." And as to "all the *rest* of her jewels, watches," &c., the testatrix gave them to her daughter *Louisa*. The testatrix had not, at the time of making her will, any jewel box at Messrs. *Rundell & Bridges*, but she had a jewel box then deposited with a banker; neither was any paper found containing directions as to the disposition of the jewels: about two years

(*j*) Touchstone, 416.

(*k*) 2 P. Wms. 387.

(*l*) But see *Jubber v. Jubber*,
infra, next page.

(*m*) 6 Ves. 100.

(*n*) See also *Mohun v. Mohun*, 1
Swans. 201, *infra*.

(*o*) 4 Russ. 388.

before her death she became the subject of a commission of lunacy. The Master reported, that the jewels, &c., were by the will specifically given to the daughter; and to this report exception was taken on the ground, that in order to ascertain what the daughter was to take, it must be known what the jewel boxes at Messrs. *Rundell & Bridges* contained, and as there were none to be found, "the rest," which the daughter was to take, could not be ascertained, and *Peck v. Halsey* (p) was cited. Sir *John Leach*, M. R., allowed the exception, observing, that the will contained no present gift of the jewels, but referred to a future act to be done by the testatrix to complete the gift, which future act being prevented by the subsequent lunacy the intended gift wholly failed.

Of mistakes,
&c. in the
subject be-
queathed.

In the quantity.

In *Jubber v. Jubber* (q), a request that a handsome gratuity should be given to each of the testator's executors was held void for uncertainty, and Sir *L. Shadwell*, V. C., did not think himself at liberty to give any such recommendation as was given in *Peck v. Halsey* (r).

But where the Court can rectify the mistake, it will.

In *Masters v. Masters* (s), the uncertainty in the quantity or amount of the fund intended to be given arose from the illegible mode in which parts of the will were written; and particularly in one place the figures, intending to show the amount of the legacy, had been altered, and it was doubtful whether 100*l.* or 300*l.* were intended to be given. Sir *Joseph Jekyll*, M. R., referred it to a Master to examine and see what the legacies were, and for that purpose to be assisted by persons conversant in the art of writing.

The case of *Milner v. Milner* (t), referred to in a former page (u), may be here stated, as it shows the willingness of the Court to rectify mistakes of testators, and to effectuate the intention; and where that is plain, to make it prevail against erroneous words. The mistake arose from an inaccurate recital of a settlement. Sir *William Milner* bequeathed thus: I give my daughter *Mary* 3,500*l.*, which, with 6,000*l.* she is entitled to by my marriage settlement, and 500*l.* from her grandfather, make up 10,000*l.*; which is the sum I design she shall have for her fortune." It happened that *Mary* was only entitled to 5,000*l.* by the settlement, and she filed her bill to have 4,500*l.*

(p) *Ubi supra.*

(q) 9 Sim. 503.

(r) *Supra.*

(s) 1 P. Wms. 421, 425.

(t) 1 Ves. sen. 106; Belt's ed.

(u) P. 300.

Of mistakes,
&c. in the
subject be-
queathed.

In the quantity.

raised to make up the 10,000*l*. Lord *Hardwicke*, C., decreed accordingly; observing, that in wills the intent was principally to be regarded; and to answer that, a mistake in computation should be relieved against; that in cases of that sort the Court was not always confined to the order of the words, but to make the sense plain, a change might be made; that if the testator had given more than was sufficient to make up 10,000*l*., the legatee must have abated; and that for the same reason she should have the express sum then (v).

Here also may be added the case of *Philipps v. Chamberlaine* (w), wherein the testator clearly manifests an intention to give the smaller of two sums to his daughter, and by mistake gives the larger. In that case *Benjamin Bond Hopkins*, after a variety of devises and bequests, directed his trustees to invest the monies, to arise from the sale of his real and personal estate, upon government or real securities; and, after providing for payment of certain annuities out of the produce, directed his trustees to stand possessed of the funds and securities, upon trust, out of the interest, &c., "to pay his daughter *Catherine Bond Hopkins*, from the day of her attaining twenty-one to the day of her attaining twenty-four, or marrying under the last mentioned age, the annual sum of 800*l*., as and for the interest upon the sum or legacy of *twenty thousand pounds* hereinafter directed to be paid to her; and also by sale of sufficient part of the stocks, funds, or securities, raise the sum of *thirty thousand pounds*, and pay the same to his daughter *C. B. Hopkins*, upon her attaining twenty-four, or marrying under that age with consent, &c." Then the testator, after adverting to the event of his daughter dying under twenty-four, and unmarried, declared that "In such case the legacy or sum of *twenty thousand pounds*, hereinbefore directed to be raised and paid to her, shall not be raised," but sink into the residue. The question was, whether the daughter was entitled to a legacy of 20,000*l*. or 30,000*l*. Lord *Alvanley* decided that she was entitled to the former; being clearly of opinion, that the 30,000*l*. was by mistake substituted for 20,000*l*. His Lordship, in answer to the question why was it not 20,000*l*. in mistake for 30,000*l*., said that 800*l*. is not the interest, in any reasonable way of calculating, of 30,000*l*., but of 20,000*l*. at four *per cent.*, and in addition to this argument, his Lordship conceived the subsequent reference to a legacy of 20,000*l*. before directed to be raised, afforded the most

(v) *Trevor v. Trevor*, 5 Russ. 24.

(w) 4 Ves. 53.

satisfactory demonstration of the testator's intention to give only a legacy of 20,000*l*. Of mistakes, &c. in the subject bequeathed.

For other instances of mistake by the testator in the calculation of the amount of the fund bequeathed, see cases cited in note (x).

3. In the *third* place, we advert to the subject of mistake in the *name* of the thing bequeathed. 3. Mistake in the name of the subject.

In this case the mistake is not in general fatal; for where the testator has no other specific chattel, to which the terms of the bequest can apply, and merely calls it by a wrong name, the intention to give the chattel and the thing itself is sufficiently apparent. As, where the testator having but one horse, and that called *Arundel*, bequeaths it by the name of *Bucephalus*, it will not avoid the gift (y).

In *Skerratt v. Oakley* (z), *J. Skerratt*, after giving 700*l*. to his wife, and also the yearly interest of the sum of 1,200*l*. for her life, devised to her his lands at *Northwood*; and as for his leasehold estates at *Wrentnall*, and also his estate at *Northwood*, after his wife's decease, and the residue of his real and personal estate, and the sum of 1,200*l*. after his wife's decease, he gave and devised the same to *G. Walmsley* and *J. Gough*, absolutely, in moieties. By a codicil, the testator directed that the sum of 700*l*. and the other bequests given and made to his wife by the will, should be in full of all demands to which she should be entitled in or out of his real or personal estate, *except the estate for life of his wife and her assigns, in the premises at Wrentnall aforesaid*; anything in his foregoing will to the contrary notwithstanding. The question was, whether the words in the codicil, "except the estate for life of his wife and her assigns, in the premises at *Wrentnall* aforesaid," amounted to a devise of the premises at *Wrentnall* to the wife; or whether the word, *Wrentnall*, was not inserted in the codicil by mistake, for "*Northwood*." Lord *Kenyon* was of opinion, that *Wrentnall* was so inserted by mistake; observing, that it was impossible not to be of that opinion, after collecting the testator's intention from the whole

(x) *Clarke v. Guise*, 2 Ib. 617; *Berkely v. Palling*, 1 Russ. 496; *Phipps v. Lord Mulgrave*, 3 Ves. 613; *Brackenbury v. Brackenbury*, 2 Eden, 275; Amb. 474; see also *Pickford v. Randal*, cited *arguendo*; 5 Ib. 26; *Jaques v. Johnson*, 2 M. & K. 64; *King v. Wright*, 14 Sim. 400. *Danvers v. Manning*, 2 Bro. C. C. 18; *Stebbing v. Walkey*, Ib. 85; (y) *Touchstone*, 415. *Whitfield v. Clemment*, 1 Mer. 402; (z) 7 T. R. 492.

Of mistakes,
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of the will and codicil; which clearly was not to give anything by the codicil, but to prevent his wife's claim to dower, to which he supposed she would be entitled without some restriction.

4. Mistake not
rectified unless
clear.

4. Lastly, we adduce instances, wherein the Court has refused to correct the supposed mistake.

Although Courts of Equity are in the habit of correcting errors and mistakes in bequests, yet that exercise of its jurisdiction is to be resorted to with great caution (*a*). If, therefore, in order to correct any supposed mistake, it be necessary to reject words contained in the will, such supposed mistake will not be corrected, unless, upon a fair construction of the whole will, those words cannot be reconciled; and if the mistake be not thus clearly demonstrable, but is merely presumptive or conjectural, and can in any way be reconciled with the rest of the will, the Court will not correct the supposed mistake: for it is a rule of construction, that mistakes in a will are never to be intended, if a reasonable construction can be found out (*b*).

Thus, in *Mellish v. Mellish* (*c*), *Samuel Mellish* bequeathed to his natural daughter, *Ann*, by *Mary Ross*, 3,000*l.* three *per cent.* government securities, payable at twenty-one or marriage; but if she died before that time, he directed the legacy to be considered part of his residuary estate. He then bequeathed the residue of his estate, subject to some legacies and annuities, to his natural children by *Mary Whitaker*, viz. *Mary*, *Samuel*, *Thomas*, *Fanny*, and *Charlotte*, equally, when his sons should attain twenty-one or be married, "provided that, in case of the death of any of them, the said *Ann*, *Mary*, *Fanny*, and *Charlotte*, before their respective ages of twenty-one or marriage, or of the said *Samuel* or *Thomas* before twenty-one, without a child or children then surviving, who should attain twenty-one, he bequeathed the part, share or shares of him, her, or them, so dying, unto the survivors in equal shares, to be divided among them at the time appointed for their original shares: but if all his children, except one, should happen to die, and the sons without issue as aforesaid, he then gave the residue to such surviving child." The testator then declared, that if his said natural daughters happened to marry before twenty-one, without the con-

(*a*) See *Powell v. Mouchett*, *Mad. & Geld.* 216.

(*b*) *Purse v. Snaplin*, 1 *Atk.* 415, *supra*; and see *Miller v. Travers*, 8

Bing. 244; *Blundell v. Gladstone*, 11 *Sim.* 467; 1 *Phil.* 279.

(*c*) 4 *Ves.* 45.

sent of his executors, his executors should be possessed of the moiety of her "portion or fortune," and the interest she should be entitled to under his will, in trust to pay the interest to her during the coverture, for her separate use, &c. The testator having two natural children by *M. Whitaker*, after the date of his will, *viz. Esther* and *Harriet*, added a codicil, declaring them to be entitled to all the provisions of the will, benefit of survivorship, &c., equally with the other natural children, which he had by *M. Whitaker*, and therein named; he then corrected an error he committed in his will, in the name of *Ann's* mother, which was *Elizabeth*, instead of *Mary*, and confirmed *Ann's* legacy. *Harriet* died under twenty-one, and unmarried; and the question was, whether *Ann* was entitled, with the surviving children of *M. Whitaker*, to a share of *Harriet's* legacy, which depended on the question, whether *Ann's* name was inserted by mistake in the clause of the will, giving benefit of survivorship. Lord *Alvanley*, M. R., was of opinion, that there was not sufficient in the will to enable him to declare, that, demonstrably and incontrovertibly, the name of *Ann* was inserted by mistake; observing, "I really believe it was so, but I dare not, as a Judge, take upon myself to say, this word cannot be reconciled with the rest of the will; and I always understood, that where there is a mistake or an omission, all the Court has to do, is, to see whether it is possible to reconcile that part with the rest, and whether it be perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission." Lord *Alvanley's* opinion seems to have been influenced principally by the following reasons; that he could not exclude *Ann* from the operation of the proviso respecting marriage without consent of the testator's executors; that the codicil afforded evidence of the accuracy with which the testator had perused his will; and that, if he had corrected a slight error in the name of *Ann's* mother, in all probability he would have corrected the other and greater error: that if *Ann* were to be excluded in the clause of survivorship, she might as well be excluded from the clause providing for the death of all his children except one, which, if allowed, and *Ann* were to be the survivor, would make the testator die intestate.

Of mistakes,
&c. in the
subject be-
queathed.

Not rectified,
unless clear.

Again, in *Smith v. Maitland* (d), where the testatrix was mistaken in the condition of her property, 1,200*l.* three *per cents.* were, upon the marriage of *Denew* and his wife, vested in trustees

(d) 1 Ves. jun. 362.

Of mistakes,
&c. in the
subject be-
queathed.

Not rectified,
unless clear.

in trust for the wife until twenty-one, then for the husband during the marriage; and if the marriage should dissolve without issue by the death of the wife, then for the husband for life, and afterwards for such purposes as the wife should appoint; but if the marriage should dissolve by death of *Denew*, without issue, then to transfer the fund to the wife absolutely. By articles of separation, it was agreed the trustees should hold the property during the joint lives of *Denew* and his wife, for the separate use of the latter; but if *Denew* survived his wife, it was to go in the same manner as provided by the marriage settlement, in the event of *Denew's* death in his wife's lifetime. In consequence of these articles, *Denew* and his wife lived separate; and the latter died in the lifetime of *Denew* without issue, and by a testamentary paper bequeathed as follows: "Upon in-gathering my effects, and winding up my affairs, my free gear are to undergo the following division. First, my executors to pay my debts out of the first and readiest part of my gear; the residue to appertain to themselves, after paying the following sums: To Mrs. *Squibb*, 100*l.* three *per cent.* consols; to *Samuel Primrose*, 100*l.* three *per cent.* consols. In consideration of the trouble of my executors, those sums to revert to them at the death of the legatees; and if any other of my legatees (Mrs. *Arnold* excepted) die before Mr. *Denew*, their legacies to revert to my executors or their heirs; *S. Primrose* and Mrs. *Squibb* being only meant to be life rentors. To Mrs. *Arnold*, 200*l.* of the said stock; to Mrs. *Smith* 200*l.* of the said stock;" and after several other dispositions, the testatrix added, "it is to be understood by my legatees, that the money bequeathed, as before mentioned, is in the three *per cent.* consols; the interest of which, Mr. *Denew* is to enjoy, agreeably to articles of separation between him and me till his death; and my legatees are to draw no more than what the 100*l.* in the said stock will bring at the time of the sale, which is to be at the first, or at the option of my executors at the second term (quarter-day), after the death of Mr. *Denew*." The questions were, whether the legacies were payable immediately, or not until the death of Mr. *Denew*, and if not during his life, whether the legatees were entitled to the intermediate interest and dividends. It was urged on the part of the executors, that the whole effect of the will as to Mrs. *Arnold*, was, to make her legacy vested, though she should die before Mr. *Denew*, but that the other legatees were to be entitled to claim their legacies in the event only of surviving *Denew*: and Lord *Thurlow* was of that opinion, observing, that the testatrix had mistaken her power

over the fund, and that there were no words to shew what her will would have been, had she not so mistaken: and his Lordship refused to reform the mistake (e).

Of mistakes, &c. in the subject bequeathed.

In *Stavers v. Barnard* (f), a residuary personal fund was bequeathed to trustees upon trust to apply the dividends for the maintenance of the testator's children until the youngest should attain twenty-one, and then to divide the same equally between B. D. E. and F., children by his former wife, and G. and H., children by his present wife, or such other child or children as might be living or as his said wife might be *enceinte* with at his decease. At his death the testator left two other children by his first wife who were not named in his will (namely) A. and C. Sir J. L. Knight Bruce, V. C., notwithstanding some expressions taken by themselves, was of opinion, upon the whole will, that the omission was no mistake but intentional.

Not rectified unless clear.

A mistake in the recital of the will, will not be material (g).

5. It remains to observe, that in cases similar to those above stated, wherein the Court cannot judicially pronounce the supposed error, such a mistake as is irreconcilable with the rest of the will, there it will not admit parol evidence for the purpose of raising or establishing any such error.

5. Of parol evidence.

Thus, in *Hampshire v. Peirce* (h), the words of the bequest were as follows: "I further give, limit and appoint, unto the children of my late cousin, E. Bamfield, the sum of 300l." At the date of the will, E. Bamfield had two children by a former husband, and four by a second, who were living at the testator's death. Parol evidence was read, to shew that the testator intended by the words "children of my late cousin, E. Bamfield," the four which she had by her second husband. But Sir John Strange, M. R., refused to give any weight to such testimony, observing, that as the terms of the bequest included all the children of E. Bamfield, the admission of verbal declarations to narrow their import, would be doing violence to the will.

It is sufficient in this place to refer the reader to the observations respecting the admission of parol evidence, made in former pages of this work (i).

(e) See *Williams v. Jones*, 1 Russ. 517, *supra*, 481.

(f) 2 Yo. & Coll. (C.), 539.

(g) *Shelley v. Bryer*, 1 Jacob, 207.

(h) 2 Ves. sen. 216.

(i) Vol. 1. Chap. II. sect. xvii; Chap. IV. sect. iv.

Construction of
bequests gene-
rally.

Rules of.

SECT. IX. Of the construction of bequests *generally*.

Under this head, it may not be unacceptable to the reader, in the first place, to enumerate some of the leading rules of construction generally applicable as well to wills of real as of personal estate; and, in the next place, to adduce some instances of the application of these rules in the construction of bequests of personalty, not within the classes of cases discussed in the preceding sections of the present chapter: and lastly, some instances of the construction of certain words and phrases.

1. Rules.

1. *First*, as to the rules of construction applicable to wills in general. *Croke*, Justice, in *Mirril v. Nichols* (*j*), lays down the three following rules, which, he says, being observed as a key, will open all the doors in any will; 1. No will ought to be construed *per parcella*, but by the entirety; 2. No contrariety or contradiction to be admitted; 3. No nugation, nor anything nugatory ought to be in a will. These rules have been repeatedly confirmed, explained and illustrated, by subsequent decisions; as will be seen by the references cited below; the following may be considered a commentary on *Croke's* rules.

1. Effect ought to be given to the *whole* will, if possible (*k*); so that every word ought to have effect, unless inconsistent with the general intention (*l*); and a codicil is to be taken as a component part of the will (*m*).

2. Consistently with the foregoing rules, Courts of Law and Equity (*n*), to make sense of a will, if otherwise insensible, and to make it take effect rather than be totally void, will often *transpose* words to attain the intent apparent on the face of the will (*nn*); the order of the words not being considered, if the intent can be better answered by transposing them (*o*).

(*j*) 2 Bulst. 178.

(*k*) *Gray v. Minnethorpe*, 3 Ves. 106, *supra*; *Vauchamp v. Bell*, 6 Mad. 343; *Francis v. Collier*, 4 Russ. 331; *Woodhouse v. Woodhouse*, 5 Jur. 404; *Jennings v. Neuman*, 10 Sim. 219.

(*l*) *Blandford v. Blandford*, Roll, 319; *Constantine v. Constantine*, 6 Ves. 102, *supra*; see also *Gittins v. Steele*, 1 Swan. 24, 28; *Bateman v. Earl of Roden*, 1 J. & Lat. 356, 368;

Morrall v. Sutton, 1 Phil. 533, 536, S. C.; 4 Beav. 478; 5 Ib. 100.

(*m*) *Grosbie v. Mac Doual*, 4 Ves. 610; *Hopkins v. Fowle*, 3 Russ. 304; *Thompson v. Thompson*, 1 Coll. (C.), 392; *Pratt v. Pratt*, 14 Sim. 129.

(*n*) 2 Ves. sen. 74, per Lord Hardwicke, C.

(*nn*) *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 74.

(*o*) *East v. Cook*, 2 Ves. sen. 31.

3. But general words, if inconsistent with other parts of the will, will nevertheless be *controlled*, to make the whole will consistent (*p*).

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4. And to effectuate the testator's intention, words evidently repugnant with the context of the will, will be *rejected* (*q*).

5. The converse of the last rule is also true; for if a testator expresses himself incorrectly, the Courts will *supply* proper words, if the meaning distinctly appear (*r*).

6. Technical words must be understood according to their legal import, unless a testator manifest a clear intention to the contrary (*s*).

7. Nor is the obvious meaning of words to be rejected, upon suspicion that the testator did not understand what they meant (*t*).

8. Nor can an express disposition, though probably involving an oversight or mistake by the testator, be controlled by inference which is not necessary and indubitable (*u*); it being the safest course to abide by the words (*v*).

9. Where a residue is given, every presumption is to be made that the testator did not intend to die intestate (*w*).

10. If two parts of a will are totally inconsistent, the latter

(*p*) *Whitmore v. Trelawny*, 6 Ves. 133; *Strong v. Teat*, 2 Burr. 920; *Roe v. Reade*, 8 T. R. 122; *Mackinnon v. Sewell*, 5 Sim. 78; 2 Myl. & K. 202; *Walker v. Pechell*, 14 Law J. (C. P.) 211; *Hillersdon v. Lowe*, 2 Hare, 355.

(*q*) *Boon v. Cornforth*, 2 Ves. sen. 276; Hob. 65; 5 Mod. 112; 2 Lord Raym. 831; *Sherratt v. Bentley*, 2 M. & K. 149.

(*r*) *Dodson v. Hay*, 3 Bro. C. C. 407.

(*s*) *Green v. Howard*, 1 Bro. C. C. 33, *supra*; *Rayner v. Mowbray*, 3 Bro. C. C. 234, *supra*; *Holloway v. Holloway*, 5 Ves. 401, *supra*; *Mor-*

rall v. Sutton, 1 Phil. 533, 536; S. C. 4 Beav. 478; 5 Ib. 100; *Ridgeway v. Munkittrich*, 1 Drew & W. 84; *James v. Smith*, 14 Sim. 214.

(*t*) *Milnes v. Slater*, 8 Ves. 306, *supra*; *Hopkins v. Towle*, 3 Russ. 304; *Pratt v. Pratt*, 8 Jur. 507.

(*u*) *Collett v. Lawrence*, 1 Ves. jun. 269; *Wainwright v. Wainwright*, 3 Ves. 558; *Wheeler v. Stroud*, 9 Jur. 271.

(*v*) *Crooke v. De Vandes*, 9 Ves. 205; *Lett v. Randall*, 10 Sim. 112; *Davenport v. Coltman*, 12 Sim. 605.

(*w*) *Philipps v. Chamberlaine*, 4 Ves. 59.

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prevails (x); but this is applied only after the failure of every endeavour to give such a reasonable construction to the entire dispositions as will render every part of them operative (y).

Where therefore the words of a provision in a will admit of two constructions, the more obvious and natural, or the more probable of the two constructions, is to prevail, unless the context require a different construction; or unless the adoption of that construction is attended with consequences not attending the other construction which the words admit of, consequences so unreasonable that the Court ought to reject that construction (z).

11. Though wills *operate* from the *death* of the testator, yet for some purposes they are *construed* from the *making*; unless circumstances or the tenor of them shew, that the construction should be from the death; the intermediate time is not regarded (a).

By the 24th section of the 1 Vict. c. 26, it is enacted that every will shall be construed to speak and take effect, as if it had been executed immediately before the testator's death, unless a contrary intention shall appear by the will.

12. The constructions of wills of immoveable property is governed by the *lex loci rei sitæ* (b), but the construction of wills of moveable property is governed by the law of the domicil (c).

13. Of two modes of construction that will be preferred which will prevent intestacy (d).

14. Where a testator uses the same words in different parts of the will, it is to be presumed he attaches to them the same meaning, unless a different intention can be collected from the context (e).

(x) *Constantine v. Constantine* 6 Ves. 102, *supra*; *Morrall v. Sutton*, 1 Phil. 533; S. C. 4 Beav. 478; 5 Ib. 100.

(y) *Shipperdson v. Tower*, 1 Yo. & Coll. (C.) 459.

(z) *Pennington v. Buckley*, 11 Jur. 468.

(a) *Lomax v. Holmden*, 1 Ves. sen. 295; *King v. Bennett*, 4 Mee. & W. 36. Upon the construction of

Wills, see Touchst. Hill. ed. 416, &c.

(b) Prec. Ch. 577; 1 Vern 84; 5 B. & C. 438; 2 Cl. & Fin. 571.

(c) 8 Sim. 279; 4 Myl. & Cr. 76; 8 Sim. 310; 3 Myl. & Cr. 559, and 1 Jar. Wills. Ch. I.

(d) *Morrall v. Sutton*, 1 Phil. 536.

(e) *Ridgeway v. Munkittrick*, 1 Dr. & W. 93; *Carter v. Bentall*, 2 Beav. 551.

II. *Secondly*, we proceed to the further illustration of these rules, in adducing instances of their application to bequests of personalty, and particularly rules one and eight.

Construction of bequests generally.

2. Examples.

1. Effect ought to be given to the whole will if possible so that every word ought to have effect unless inconsistent with the general intention.

1. Effect to be given to the whole will if possible.

Thus, in the case of *Earl of Newburgh v. Eyre* (e), the testator bequeathed the monies arising from the sale of his *Leicestershire* estates in fifths, two to his cousins *Charles* and *James* each, and one to his cousin *Mary* for their lives. If *Mary* should die without leaving issue (which happened), her fifth to be divided between *Charles* and *James*, if then living, for their lives, or if one alive to the survivor. If *Charles* left issue, they were to be entitled to the principal monies, the interest whereof was given to the said *Charles* for life: but if *Charles* died without such issue, living *James*, he was to have all the benefit of the bequest made to *Charles*: and if *James* should, without having succeeded to the family estate at *Hassop* for the space of five years next before his death, leave any lawful issue not being an eldest or only son living at his decease (and which event did take place), then such issue should be entitled to all the principal monies, the interest whereof the said *James* "may be entitled to as aforesaid," and if both should die without leaving any lawful issue to be entitled as aforesaid, the fund was to go as the survivor should appoint. *James* having survived, *Mary* died in the lifetime of *Charles*, leaving an only daughter without having been in possession of the estate, and Sir *John Leach*, M. R., held that the daughter of *James* was entitled to the whole five-fifths. The ground of his Honor's opinion was, that as *James* died not having been five years in possession of the *Hassop* estate, leaving issue not being an eldest or only son, the issue was entitled to the principal monies, the interest of which *James* might have been entitled to and that although he actually did not become entitled to the interest of the whole five-fifths, yet in events that might have happened, he would have so become entitled, and his Honor conceived that that construction respecting the gift to *James* would best effectuate the general intention.

2. Where the testator, in the disposition of his property, overlooks a particular event, which, had it occurred to him, he would

2. Words of will adhered to, notwithstanding probable oversight.

(e) 4 Russ. 464.

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in all probability have provided against, the Court will not rectify the omission by implying or inserting the necessary clause; conceiving it would be too much like making a will for the testator, rather than construing that already made.

Thus, in *Ferguson v. Dunbar* (g), *William Dunbar* bequeathed to the plaintiff, his executor, so much of his personal estate as would purchase an annual sum of 550*l.* which he gave to his wife for life, and he directed the principal, after her death, to be paid to his children; viz., one-half to his son *George*, the other to his daughters, *Elizabeth* and *Charlotte*, equally, if living at the death of their mother; and, if any of them should die in the lifetime of the mother, leaving issue, he gave that share to the issue of such child or children equally, at the age of twenty-one or marriage; but if any of them should die before twenty-one, without issue, he gave *that share to the survivors*, and if all of them died without leaving children, then he directed the same to fall into the residue of his personal estate; he gave his daughters 8,000*l.* each, and appointed his son residuary legatee. *Charlotte* married *Richard Mitchell*; after which the mother died. Then *Charlotte* died, leaving two daughters, who were defendants to the bill by the executor. After the death of *Charlotte*, *Elizabeth* died under age, and without issue; and the question was, whether the children of *Charlotte* were entitled to any part of the share of *Elizabeth*, or whether *George* was entitled to the whole fund as the only surviving child of the testator: and Lord *Thurlow*, C. declared that *George* was so entitled, observing, that this was one of those cases, in which he had the mortification to see, that what was most probably the testator's intention, could not be executed, for want of his having been properly advised, and having sufficiently explained himself; that he thought the testator meant the children should take the share, which would have accrued to the surviving parent, if living; but not having said so, but limited such share to the survivors or survivor, he must declare *George* entitled (h).

Again, in *Calthorpe v. Gough* (i), Sir *Henry Calthorpe* bequeathed 10,000*l.* to trustees, to invest in the funds, and pay the interest during the lives of Sir *Henry Gough* and Dame *Barbara* his wife, to Dame *Barbara*, for her separate use; but *if she should die in the lifetime of her husband*, then to dispose of

(g) 3 Bro. C. C. 469, in note.
Belt's ed.

(h) See also *Bayard v. Smith*,
p. 1394.

(i) 3 Bro. C. C. 395, note.

the 10,000*l.* as she alone, notwithstanding her coverture, should appoint; and in default of appointment, to pay the same unto all the children of Dame *Barbara*, then living, equally; but if there should be no child or children then living, in trust to pay the 10,000*l.* to such person as should then be in possession of the manor, &c. by virtue of the will; yet if Dame *Barbara* should survive her husband, then, after his death, in trust to pay the whole 10,000*l.* to her for her own use. Dame *Barbara Gough* survived her husband, but died in the lifetime of the testator leaving children. The question was, whether the children, who survived the testator, were entitled to the legacy of 10,000*l.* under all the circumstances; and Lord *Alvanley*, M. R., decided that they were not; observing there was no event, in which the children could take anything of which it was not in her power to deprive them. The testator presumed, as every testator does, that the persons who were to take under the will, would survive. If he had foreseen the event which had happened, he would probably have provided for it, but that consideration ought not to alter the judgment, for the same observation would apply to all cases of lapsed legacies.

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In *Doe v. Brabant* (j), the testatrix bequeathed 1,000*l.* three per cent. consols, and other property, in trust for *Sarah Counsell*, of the age of twelve years, until she attained twenty-one, at which time she directed her trustees to transfer the principal sum to her for her own use; but if she should die under the age of twenty-one, leaving any child or children, then in trust for all and every such child or children, who should live to attain their ages of twenty-one, equally, if more than one, but if one only, then in trust for such only child; but if *Sarah Counsell* should die under the age of twenty-one, without leaving any child or children; or, being such, all should die under twenty-one, then in trust for the testatrix's nieces. *Sarah Counsell* attained twenty-one, but died in the testatrix's lifetime, leaving two children, the plaintiffs, who claimed the provision in the will, though their mother died in the life of the testatrix, having attained twenty-one; insisting that it must have been her intention to have provided for the children equally with the mother; and that, therefore, words ought to be supplied to effectuate that intention. On the other hand, the nieces contended, that as the mother attained twenty-one, and then died before the testatrix, the legacy lapsed, and that the event, upon which the children were

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to take, namely, the death of the mother under twenty-one, not having happened, they were not entitled; and the Court of King's Bench, upon a case stated by the Chancellor, were of that opinion: and Lord *Thurlow* decreed against the claim of the children, though it militated against the opinion he delivered prior to sending the case to the *King's Bench*.

In the last case Lord *Thurlow* considered the decision of Lord *Alvanley* in *Calthorpe v. Gough*, as contradicting all preceding cases, and which, if permitted to remain an authority, it would subvert. His Lordship's opinion, however, seems incorrect; for the authority of *Calthorpe v. Gough*, not only remains unimpeached, but is corroborated by the last cases, and others decided upon the same subject.

In *Denn v. Bagshaw* (*k*), (a case of frequent reference upon the present subject), *Adam Bagshaw* devised certain lands to his daughter *Margaret Bagshaw* for life, with remainder to her first son, *if living at the time of her death*, and to the heirs male of such son; with remainder to her second, third, fourth, and all other sons successively in tail male, in the same manner as to the first son and his heirs male; with remainder in default of such issue male, to his nephews in tail male, as limited in the will, with the ultimate remainder to his own right heirs. *Margaret Bagshaw* had issue an only son, who died in her lifetime, leaving a son, the lessor of the plaintiff; and the question was, whether the grandson was entitled, under the above devise, his father not having survived *Margaret Bagshaw*. It was contended for the grandson, that the obvious intention of the testator was, that the nephews should take nothing, so long as any male descendant of *Margaret* was living, which intention the Court would effectuate, either by converting the life estate of *Margaret* into an estate tail, or by construing the limitation to her first son an estate tail, vesting when he came *in esse*, and liable to be divested by his death during *Margaret's* life without leaving issue male. On the other side, it was urged that *Margaret* took an estate for life only, and the remainder to her son was upon the contingency of his surviving his mother, an event which never happened. That although the Court would go far in moulding the words of a will to effectuate a general intention, yet that intention must be apparent on the face of the will, and not founded in *conjecture*; for the Court would not provide for an event, which the deviser never contemplated, were it ever so

(*k*) 6 Term Rep. 512.

reasonable; nor, if there were two intents, the one expressed, the other to be implied, would they reject the former in favour of the latter, unless the intent expressed could not legally be carried into effect. That the nephews appeared to have been very considerable objects of the testator's bounty, and that his intention seemed to have been, that neither his daughter, nor her son jointly with her, on his attaining twenty-one, should defeat the remainder over to the nephews by any act. But that intention would have been defeated, either by giving *Margaret Bagshaw* or her son an estate tail, for then they might have barred the entail, and let in the female descendants of *Margaret Bagshaw*. That the case must be decided upon the same principle, as if *Margaret Bagshaw's* son had attained twenty-one in the lifetime of his mother, and the question had been, whether they jointly could have barred the estate tail, which could not be supported: and that although the devisor might not have wished to disinherit his grandchildren, in the event which had happened, yet he might have preferred the risk, which was not a probable one in the course of events, to the more usual and certain chance of his daughter or her son doing every act in their power to defeat the remainder to his nephews. The Judges were unanimously of opinion in favour of the defendant. Lord *Kenyon* observed, that all the cases cited for the plaintiff (the testator's grandson) proceeded, not on the formal and technical words, but on informal words in the wills where the Courts were left to collect the intention of the devisor, as well as they could, from the different parts of the wills; but here technical and correct expressions were used throughout. His Lordship cited the case of *White v. Warner* (l) as in point.

Construction of bequests generally.

Rules of, exemplified.

Similar to the preceding case is that of *Holmes v. Cradock* (m). There *William Sisson* gave and devised certain freehold, copyhold, and leasehold estates to *Francis Holmes*, his heirs, &c., upon trust to pay, out of the rents and profits, to the testator's wife *Elizabeth*, an annuity of 100*l.* for life; and the residue to the testator's son, *William Sisson*, during the life of his mother; and if his (testator's) son should happen to die *before* his mother, without leaving a widow or child, then in trust to pay the rents and profits to her for life; and, subject to the aforesaid trusts, that the said *Francis Holmes* should stand seised to the use of the said *William Sisson* the son, his heirs and assigns, for ever,

(l) Doug. 344, note 4, and cited by Lawrence, J.; 6 T. R. 517.

(m) 3 Ves. 317.

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emplified.

chargeable with legacies thereafter given to the said *Francis Holmes*, and three other legatees (naming them). In a subsequent part of his will the testator added, "and if my son shall die, leaving my wife, without leaving a widow or any child, after his death and my wife's, I give and bequeath to my kind friend and relation, Mr. *Francis Holmes*, of, &c., the sum of 500*l.*, &c., which said several legacies I charge upon my real estate hereinbefore limited, to my son and his heirs. The testator appointed his son and *F. Holmes* executors. The testator's wife survived her husband a few months. Some years after, *W. Sisson*, the son, died above the age of twenty-one, and without leaving either widow or child. *Francis Holmes* filed his bill for the legacy of 500*l.*, and the question was, whether, in the events which had happened, he was entitled. It was contended on his behalf, that the mode in which the legacy was given was a mere mistake; that the words, "after his death and my wife's," were superfluous and absurd, unless intended to mark the time of payment. On the other hand, although it was admitted that, in the event which had happened, the testator did not mean the legacies to fail, yet that the testator had not adverted to that event; *quod voluit non dixit*; and that the words could not be rejected. Lord *Alvanley*, M. R., dismissed the plaintiff's bill, being of opinion, that he was not at liberty to reject the words; and if he gave effect to them the legacies did not arise (*n*).

Again, in *Parsons v. Parsons* (*o*), *William Cole* bequeathed to his executors 1,600*l.* three *per cent. consols*, in trust to pay the interest to *Isabella Henwood*, then residing with his wife, *Mary Cole*, until the expiration of three months after his wife's death; and if *I. Henwood* should be *then living, and have attained twenty-one*, in trust, to transfer the principal to her for her own use, with all arrears of interest; but if *I. Henwood* happened to die before the end of the three months, under twenty-one, and unmarried, then the legacy was to become part of his residuary estate. If, however, *I. Henwood* survived the testator's wife, and if, when she should be entitled to a transfer of the funds, she should be married, in that event, he directed his executors to pay the 1,600*l.* three *per cents.* to such person, and in such manner as she, notwithstanding her marriage, should appoint, so that the same might be received by her and her children (if any) independently of her husband. But if *I. Henwood* happened to

(*n*) See also *Humberstone v. Stanton*, 1 Ves. & Bea. 389.

(*o*) 5 Ves. 578.

die under twenty-one, leaving issue, in that case he directed his executors to transfer the three *per cents.* unto and among her children living at her death, &c. The testator gave the residue of his estate to his executors, and to *I. Henwood*. *I. Henwood* married *R. Parsons* after the testator's death, and died in *the lifetime* of the testator's widow, having attained twenty-one, and leaving the plaintiff, *George Parsons*, her only child, surviving. The question was, whether he was entitled, although his mother did not die under twenty-one; and Lord *Alvanley*, M. R., decided in the negative, observing, as Lord *Kenyon* did in *Denn v. Bagshaw*, that it was one of those cases in which he found his wishes in opposition to what he was bound judicially to decide, and he declared himself, upon great consideration, under the necessity of determining that no interest vested either in *I. Henwood* or her child, as the contingency, upon which only the legacy was directed to vest, had not taken place; and he could not indulge speculations, where the intention was not manifest to give the legacy in the event that had happened.

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bequests gene-
rally.

Rules of, ex-
emplified.

Again, in *Scott v. Chamberlayne* (p), *Edward Crockley* bequeathed the residue of his personal estate to a trustee, upon trust, to place out at interest, until his grandson *Edward Sackville Turner*, should attain twenty-one, and to apply the interest, in the meantime, for his maintenance, &c., with a direction to pay the principal to the grandson at twenty-one. *But if he died before that age*, without leaving issue, then the testator gave the principal and interest to his granddaughter. By a codicil, the testator, after confirming his will in all respects, except where the codicil made any alteration, directed that the interest and principal of his residuary personal estate should not be paid to his grandson, and become his sole property until he attained the age of twenty-five. The grandson attained twenty-one, but died before he arrived at the age of twenty-five; and the question was, whether the granddaughter was entitled in the event which had happened. Lord *Alvanley*, M. R., and also Lord *Loughborough*, upon appeal, determined against the claim of the granddaughter. The former observed, that the codicil did no more than postpone the payment of the legacy, until the grandson attained twenty-five, leaving the other words of the will to operate; and that therefore the granddaughter could only claim in the event provided by the will, *viz.* the grandson dying under twenty-one, without issue; the testator having forgot to say, that

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rally.

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emplified.

if the grandson died before the age of twenty-five, without leaving issue, then the legacy should go over.

We may here add the case of *Grassick v. Drummond* (q). There the testator directed the interest of a sum of money to be paid in equal proportions annually to his mother and sisters: with ulterior bequests in favour of the children of his sisters, and then adding the following words: "I desire, in the proportions already noticed, that my mother and sisters be the residuary legatees." Upon a bill being filed by the children of the testator's sisters, praying that their interests in the residue might be declared, Sir J. Leach, V. C., decided, that the mother and sisters took the residue absolutely: observing, "I cannot add to this will upon conjecture. The mother and sisters are to be the residuary legatees, in the proportions already noticed: that is, in equal proportions. If he (the testator) meant that his mother's share of the residue should survive to the sisters and their children, he has unfortunately omitted to express that intention" (r).

3. Probable
intention not
adopted, the
inference not
being indu-
bitable.

3. We shall here add some cases forming a class distinct from the foregoing, but, like them, illustrative of the preceding rule eight; and in which cases, although the inference of the testator's intention was not so strong as in the preceding class, yet there was ground of inference that the intention was probably such as the legatee over suggested; nevertheless, as the inference in favour of that intention was not necessary and indubitable, the Court could not help the plaintiff.

Thus in *Frederick v. Hall* (s), the testator bequeathed all his personal estate, except his plate, "which is hereinafter given to my daughter," to his wife; with limitations over after her death; and took no further notice of his plate. The question was, whether this amounted to a bequest to the daughter; and Lord *Loughborough* decided in the negative, observing that he saw no manner of giving the plate to the daughter, nor any implication arising for that purpose: *non constat* whether it was to go over by executory devise, like the rest of the property, or to her absolutely.

Another case is *Upton v. Lord Ferrers* (t). There the late

(q) 1 Sim. & Stu. 517; see also *Coope v. Banning*, Ib. 534.

(r) For a further illustration of the first rule before given; see the case of *Hack v. Tuck*, 3 Swan. 270; *Jostin v. Hammond*, 3 Myl. & K. 110; *Stavers v. Barnard*, 2 Yo.

& Coll. (C.), 539, *supra*, 1459; *Willis v. Plasket*, 4 Beav. 208.

(s) 1 Ves. jun. 396.

(t) 5 Ves. 801; see also *Shelley v. Bryer*, 1 Jac. 208, and *Right v. Hammond*, 1 Com. R. 231, case of real estate.

Lord *Ferrers* bequeathed certain parts of his personal estate, adding the following exceptions, ("except my four opera shares, and my furniture in *High-street, Mary-le-bone*, and those jewels the late Lady *Ferrers* desired to be given to her grandson *Robert Sewallis Shirley*, for his wife, if he married to please his guardians or parents then living.") In a subsequent part of his will, the testator used the words "in my will or my codicil." After the testator's death a paper in the handwriting of Lady *Ferrers* was found among the testator's papers in the following words: "I suppose you will secure the diamond earrings and five pins and my Mocco watch to *R. S. Shirley*, our grandson for his wife, so that they cannot be worn by any body else, as those that were mine you will do as you please." The grandson claimed the jewels comprised in the exception, upon the ground that the words of the exception, joined with the terms of the paper writing, amounted to a gift by implication. But Sir *William Grant*, M. R., was of a different opinion; and declared that he could not supply the omission.

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rally.

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emplified.

So in *Walker v. Watts* (u), the testator *George Walker*, by his will, directed that his wife should have liberty to occupy, hold and enjoy the dwelling-house at *Liverpool* he then lived in, for one twelvemonth; provided she continued so long in *Liverpool*. "Item, I order and direct my executors to pay and allow unto my wife one guinea weekly and every week during her stay in *Liverpool*, for and towards household expenses." The widow received a guinea a week for a year after the testator's death; and continuing to reside in *Liverpool*, filed her bill claiming to be entitled to a guinea a week as long as she should reside there. But Lord *Loughborough* dismissed the bill, observing that it would be giving a vast effect to the words to suppose he meant her to have a guinea a week during her life. He supposed her to live a year in *Liverpool*; and gives her a guinea a week towards the household expenses.

In the two preceding classes of cases, the inference of intention was more or less strong, but because it was not necessary and indubitable, the Court would not aid the supposed intention, conceiving it would be assuming the power of making, rather than construing, the wills (v). But where the inference of intention is necessary, or unavoidable, that the testator intended the

(u) 3 Ves. 132.

(v) And see *Goodchild v. Fenton*,
3 Yo. & Jerv. 481; *Gibbons v.*

Langdon, 6 Sim. 260; *Dicken v.*
Clarke, 2 Yo. & Coll. (E.), 572;
Cooper v. Pitcher, 4 Hare, 485.

Construction of bequests generally.

Rules of, exemplified.

4. Inconsistent or repugnant clauses.

legatee to take on an event not accurately described, the Court will, as we have seen in a preceding section (*w*), if the event happen, aid the defect by implying the necessary words.

4. In the next place we shall illustrate rule the tenth, that where a will contains two clauses, totally inconsistent and incapable of reconciliation, the latter shall have the preference; the first deed and the last will being always to take place.

Thus in *Sims v. Doughty* (*x*), *Peregrine Sims* made a very incorrect will, with several alterations and interlineations, whereby, after reciting that his son *James Renat Sims* was indebted to him in two several sums of 300*l.* on his bond, and on a lease of a house making together 600*l.* added these words, "(which sums making together six hundred pounds, I give equally to my daughters *Mary* and *Elizabeth*:)" the words six hundred pounds were run through with a pen, and then followed these words, "and in two hundred pounds upon his note making together 800*l.*:" then another clause was run partly through with a pen and partly left: after which the following words were added, "and it is my will, that the interest of the said 800*l.* shall be paid by my executors, as the same is received, unto my said daughters *Mary* and *Elizabeth Sims*; and that the said principal sum of eight when paid off and discharged shall be for the benefit of my daughters *Mary* and *Elizabeth* and son *Edward Sims*; and I do hereby give and bequeath the same accordingly to them." The daughters filed their bill against the acting executor, claiming the debt due from the testator's son in equal shares; but Lord *Alvanley*, M. R., decided that it was divisible among them and the testator's son *Edward* or his personal representatives. His Lordship after observing that the will was almost incomprehensible, said; "The rule with regard to cases of this sort is, if, upon a general view of the will, I can collect the general intention, or any one particular object, and there are expressions in the will in some degree militating with it, if I plainly see those expressions are inserted by mistake, I may reject them. But I cannot reject any words, unless it is perfectly clear they were inserted by mistake; and if two parts of a will are totally irreconcilable, I know of no rule but by taking the subsequent words, as an indication of

(*w*) Sect. VII. of this Chap. *supra*, p. 1439.

(*x*) 5 Ves. 243; see also *Harvey*

v. Harvey, 5 Beav. 134; *Morrall v. Sutton*, 1 Phil. 533; S. C. 4 Beav. 478; 5 Ib. 100.

a subsequent intention. The Court is in a dilemma, and cannot act at all unless it does that.”

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rally.

The reader will find a remarkable instance in the case of *Doe dem. Leicester v. Biggs* (x), of the application of the rule, that subsequent words in a will shall prevail over prior inconsistent expressions. There the testator devised real estate to trustees and the survivor, his heirs and assigns, upon trust to *pay unto, or permit and suffer his niece Ann Cole to have, receive, and take* the rents and profits for her life, with remainders over. The question was, whether the legal estate passed to the trustees or to the niece: and Lord *Mansfield*, C. J., in pronouncing judgment, said; “This case might be argued and considered for ever, without advancing it at all, in law, reason, or precedent. But as it happens, in this will, the last words are ‘*permit and suffer*,’ which give the *cestui que trust* a legal estate (y); and the general rule is, that if there be a repugnancy; the first words in a deed, and the last words in a will, shall prevail; consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested.”

Rules of, ex-
emplified.

But where the repugnant words cannot be reconciled, the will affording no clue to expound the uncertain meaning of the testator, the bequest must necessarily be void for uncertainty.

Thus, in *Mohun v. Mohun* (z), *John Mohun*, being possessed of real and personal estate, made his will duly attested in the following words: “I leave and bequeath to all my grandchildren, and share and share alike:” and then added the following codicil; “and I appoint further *Thomas Harwell* and *Thomas Eggleston* my trustees for all my grandchildren and nieces.” It was urged on behalf of the grandchildren, that the person who wrote the will for the testator, by mistake transposed the words “all to,” and wrote, “to all my,” &c., instead of, “all to,” &c. But Sir *William Grant*, M. R., dismissed the bill of the grandchildren,

(x) 2 Taunt. 109; see also *Sheratt v. Bentley*, 2 Myl. & K. 149.

(y) It is scarcely necessary to remind the learned reader that it has long been an established rule of construction, that where there is a devise to trustees merely *to receive* the rents, &c. or to *permit and suffer* the beneficial owner to *receive and take them*; there, unless circumstances require a contrary construction, as where the trust is for the

benefit of a married woman, the *use* or legal estate is *executed* in the beneficial owner, the trustees or devisees merely taking the *seisin* to serve the *use*; but where the trust is to *pay* over the rents, &c. the *use* is *executed* in the trustees.

(z) 1 Swans. 201; and see *Bowman v. Millbanke*, 1 Lev. 130; and the references in note to the principal case, 1 Swans. 203; see also *Abraham v. Alman*, 1 Rus. 509.

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rally.

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observing, "This instrument presents ambiguity of every kind, both in the subject and in the objects of the bequest; who are to take, and what is to be taken. The Court cannot insert or transpose words for the purpose of giving a meaning to instruments which have none."

Nevertheless, though bequests are apparently repugnant, yet the Court will endeavour, by reference to the rest of the will, to give each a consistent meaning.

Thus, in *Adams v. Clerke* (a), the testator having bequeathed several specific legacies to various persons, gave also specific legacies to his grandchildren; which latter legacies were directed to be paid at the respective ages of twenty-one years, or days of marriage of the grandchildren. By a subsequent clause in his will, the testator appointed that all the legacies thereby given should be paid within one year after his death. Upon the bill of the grandchildren for the payment of the legacies to them within the year after the death, notwithstanding they were under age and unmarried, the Court determined that the subsequent clause, which apparently contradicted the direction for the payment of the grandchildren's legacies, must be construed so as not to be repugnant to any former clause in the will; and therefore that it must be considered as relating to the legacies not given to the grandchildren.

The last case illustrates the first rule before given.

In the case of *Thackeray v. Hampson* (b), the bequest was to the testatrix's two granddaughters in trust till they came of age or married, which should first happen, the interest to be received in the meantime and paid them: but if one of them died before marriage or of age, then to go to the survivor or her child or children; but should they both die leaving no issue, the testatrix then gave them the power to leave it by will, as they should think proper. Upon the question, what interest the granddaughters took under this bequest, Sir John Leach, V. C., after observing that it was impossible to reconcile the different expressions in this codicil, if they were to be literally understood, said, that the testatrix's plain intention was, that if either died before twenty-one and unmarried, her share should go to the other granddaughter, if she were living; or, if she were dead, to any child or children she might have left. That it was not safe to defeat this plain expressed intention of the testatrix by a subsequent ambiguous passage. Both granddaughters

(a) 9 Mod. 154.

(b) 2 Sim. & Stu. 214.

having lived either to marry or to attain twenty-one, both took absolute vested interests; and the testatrix must be intended by the expression, "should they both die leaving no issue," to have meant a dying without issue before the shares became absolutely vested.

Construction of bequests generally.

Rules of, exemplified.

We may here add the case of *Burdett v. Young* (c). There *Thomas Sutton* bequeathed as follows: "I give to my wife all my *personal estate, of what nature or kind the same may be*, to her separate use during her natural life. *Item*, I bequeath to my grandson, *A.*, and to my granddaughter, *B.*, 1,000*l.* a piece, if they attain the age of twenty-one, or shall be married;—but if they die before that age, &c., then to charitable uses. After the testator's death, one of the grandchildren, having attained twenty-one in the lifetime of the wife, instituted a suit in Chancery for immediate payment of the legacy of 1,000*l.*; upon which the questions were, whether, according to the true construction of the will, the legacies were payable when the legatees attained twenty-one or married; or whether the intention was, that the testator's widow should enjoy the whole personal estate for life; and it was finally determined in the House of Lords, that the legacies were not in this instance payable during the widow's life.

In the case of *Bird v. Wood* (d), the bequest was to the testatrix's daughter for life, and after her death, as she should appoint; and in default of appointment to the testatrix's next of kin, to be considered as a *vested interest from the testatrix's death*, except as to any child afterwards born of her daughter. The daughter having died without having had any child, and without executing any appointment, it was held by the Vice Chancellor, Sir *John Leach*, that the persons who, at the testatrix's death, would have been her next of kin *if her daughter had been then dead without children*, were plainly intended here. The daughter could not be such next of kin; for the persons intended were to take at her death; and the persons intended must have been living at the death of the testatrix, for their interests were then to be vested.

III. We, *thirdly*, proceed to adduce instances of construction of particular words and phrases.

3. Of particular words and phrases.

1. Where the *interest* or *produce* of a legacy is given to, or in

1. Bequest of interest, &c. carries principal.

(c) 9 Mod. 93; 5 Bro. P. C. 54, S. C.
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(d) 2 Sim. & Stu. 400.

Construction of
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rally.

Of particular
words and
phrases.

Interest.

trust for a legatee, or for the separate use of such legatee, without limitation as to continuance, the *principal* will be considered as bequeathed also.

Thus, in *Elton v. Sheppard* (d), *Mary Trubshaw* bequeathed 2,000*l.* to trustees, in trust to pay the produce to her daughter *Mary Elton*, for her sole and separate use; and she empowered her daughter to dispose of the 2,000*l.* as she should by will or writing appoint. The testatrix also gave the residue of her personal estate to the same trustees, in trust to pay the produce to *Mary Elton* for life, her receipt alone to be a sufficient discharge; and after her death in trust to pay the interest to testatrix's granddaughter, the plaintiff, for life; and in case her granddaughter died leaving a child or children, she empowered her to dispose of such residue to such child or children as she should think fit; but if she died without leaving any child, the testatrix gave the residue to the children of her brother *W. Sheppard*. The 2,000*l.* was set apart, and *Mary* the daughter died without making any appointment. *Mary* the granddaughter claimed the 2,000*l.* as part of the personal estate of her mother. Sir *Thomas Sewell*, M. R., was of opinion, that the words bequeathing the produce, being unaccompanied by words limiting the duration of the trust, gave the legatee an absolute interest, that the subsequent words giving a power of appointment, were merely an anxious expression of intention to give an uncontrollable power of disposition.

Again in *Philipps v. Chamberlaine* (e), *Benjamin Bond Hopkins* gave the residue of his real and personal estate to trustees, to convert into money and invest in government or real securities; and proceeded thus: "I will and direct, that my said trustees, or the survivor, &c. shall pay all the rest, residue, and surplus of the *dividends and interest* of the stocks, funds, and securities, which shall be vested in them, and shall remain from time to time after answering the several purposes aforesaid, unto and among, share and share alike, my daughter *C. B. Hopkins*, my nieces *Elizabeth* and *Marianne*, and my son *Henry Turner*, and the survivor of them, each share to be paid them as they severally attain twenty-one; and if any one of the said four persons shall die before they attain twenty-one, the share of the deceased shall be divided

(d) 1 Bro. C. C. 532; see also *Page v. Leapingwell*, 18 Ves. 463, 467; *Tawney v. Ward*, 1 Beav. 563. v. *Heron*, 12 Cl. & Fin. 161, reversing judgment of Sir E. Sugden, C., 2 Dru. & W. 89.

(e) 4 Ves. 53, 54, 58; see *Stokes*

equally between the two survivors; or should three out of the said four persons die during their minority, the survivor is to be entitled to the whole residue and surplus aforesaid." The question was, whether the capital passed to the legatees; and Lord *Alvanley*, M. R., was of opinion, that it did; and that the bequest of the dividends to the trustees and their heirs, &c. upon trust to pay it from time to time, without any limitation of duration, would carry the whole interest, even without the aid of the subsequent part of the clause, directing the shares to be paid at twenty-one with benefit of survivorship: and his Lordship observed, that if the legatees were to take for life only, their deaths under twenty-one would be of no consequence, and there could be nothing for the survivors to take.

Construction of bequests generally.

Of particular words and phrases.

Interest.

Again, in *Rawlings v. Jennings* (*f*), *John Jennings* bequeathed thus: "Unto my wife *Alice Jennings* 200*l.* per year, being part of the monies I now have in Bank security, entirely for her own use and disposal, with all my household furniture, &c." Sir *William Grant* was of opinion that the widow was entitled to the absolute interest in so much capital stock as would produce 200*l.* a year, and not to an annuity for life; that the circumstances that the testator gave expressly a life interest to another legatee, and that the bequest of 200*l.* a year was coupled with the absolute bequest of furniture, &c. were in favour of that construction.

So in *Adamson v. Armitage* (*g*), *Benjamin Haigh* made the following codicil to his will: "I give unto my very trusty and valuable servant *Lydia Adamson* the balance of my account in Mr. *Downing's* hands, with the interest thereon, to be vested by my executors in the hands of trustees whom they shall choose and name, the income arising therefrom to be for her sole use and benefit." Sir *William Grant* was of opinion that the legatee was entitled to the absolute interest in the fund; observing, "In the case of a devise of realty, words of limitation must be added to give more than an estate for life (*h*). In the case of personalty, words of qualification are required to restrain the extent and duration of the interest. *Prima facie*, a gift of the produce of a fund is a gift of that produce in perpetuity; and is consequently a gift of the fund itself;" and his Honor was also of opinion, that the bequest in the first part of the codicil

(*f*) 13 Ves. 39; see also *Oldman v. Slater*, 3 Sim. 84, *infra*, div. 17 of the present sub-sect.

(*g*) 19 Ves. 416.

(*h*) This rule of construction is now altered by 1 Vict. c. 26, s. 28.

Construction of of the entire fund was not reduced to a life interest by the bequests generally. subsequent words.

Of particular words and phrases.

Interest.

So likewise in *Stretch v. Watkins* (h), the testator, *James Stretch* bequeathed thus: "To my daughter *Anna Stretch* 120*l.* per annum, (that is to say), the interest of 4,000*l.* of my three per cent. consolidated annuities; it is my wish and will that the interest as it becomes due, be added to the principal till she attain the age of twenty-one years, except 20*l.* per annum to find her clothes, &c.;" and the testator added a similar bequest to his daughter *Mary*: and Sir *Thomas Plumer*, V. C., determined that the bequest of the interest passed the principal.

A similar decision was made in *Clough v. Wynne* (i), where the bequest in the will of *Watkin Wynne* was in the following words: "The interest of the remainder (after all my just debts may be paid), I give and bequeath to my mother, *A. S. Wynne*, for her life; and at her decease, to Miss *Catherine Clough*" (ii).

Secus, if contrary intention apparent.

But notwithstanding as a general rule, the gift of interest and dividends standing by itself is a gift of the *corpus*, yet if from the nature of the subject, or the context of the will, it appear that the produce or interest of the fund was only intended for the legatee, the gift of the interest will not pass the principal (j).

Thus in *Hamilton v. Lloyd* (k), the testatrix having a mortgage for 4,000*l.* upon the estate, of which the defendant her brother was tenant for life, and having also his bond for 120*l.* arrears of interest upon that mortgage, bequeathed thus: "I give to my brother *Lloyd*, the arrears of my mortgage upon his estate; likewise a bond from him in my possession, to be delivered to him." The question was, whether these words included the principal money due upon the mortgage; and Lord *Loughborough* decided in the negative, conceiving that the intention of the testatrix to give the arrears only was clearly and accurately expressed.

Again, in *Innes v. Mitchell* (l), *William Innes*, having bequeathed several annuities and directed the mode of payment by investing a convenient sum, by a codicil made the following

(h) 1 Mad. 253.

(i) 2 Mad. 188.

(ii) See also *Oldman v. Slater*, 3 Sim. 84, stated *infra*, sub.-div 17; *Benson v. Whittam*, 5 Sim. 22; *Mackworth v. Hincman*, 2 Keen, 658; *Hawkins v. Hawkins*, 7 Sim. 178; *Wilson v. Maddison*, 2 Y. & Coll. (C.), 375;

Gregory v. Attorney General, 2 Beav. 366; *Thompson v. Thompson*, 8 Jur. 839.

(j) *Cooke v. Bowler*, 2 Keen, 54; *Scott v. Earl of Scarborough*, 1 Beav. 154; *Clowes v. Clowes*, 9 Sim. 403.

(k) 2 Ves. jun. 416.

(l) 6 Ves. 464.

bequest: "I give to *Janet Innes* 200*l.* a year for the use of herself and children, which annuity is to be paid out of my general effects, until it be convenient to my executrix and executors to invest 5,000*l.* in the funds in lieu thereof, for her and their use, and to the longest liver of her and her children, subject to an equal division of the interest, while more than one of them alive." The question was, whether the principal or interest only of 5,000*l.* was given by the codicil; and Sir *William Grant*, M. R., observing upon the difficulty of forming any decisive opinion upon a codicil so obscurely penned, expressed his opinion to be, that the testator intended to give an annuity only, to be divided among the legatees, until there was one survivor; and then, that such survivor was to receive the whole interest (*m*).

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Interest.

In the case of *Lewis v. Lewis* (*n*), cited by Sir *William Grant*, M. R., in his decision in the case next stated, *Thomas Lewis* bequeathed to two persons a sum of above 3,000*l.*, upon trust to apply the dividends and interest to the maintenance of the plaintiff, until his age of twenty-one, and afterwards to pay the whole of the dividends to him for life; and he authorized the trustees, at any time before the plaintiff should attain the age of twenty-six, to raise any sum not exceeding 600*l.*, and to apply and dispose of the same towards or in order to the preferment or advancement in life of the plaintiff, or his other occasions, as they should think proper. After a decree directing the accounts, the plaintiff, having attained twenty-one, petitioned for payment of the 600*l.* as an absolute bequest to him; but Lord *Thurlow* directed an inquiry, what were the circumstances and situation of the petitioner, and whether they required the advancement of any and what part of the sum of 600*l.* before he should attain twenty-six: and the Master was ordered to state his opinion thereon to the Court.

In the case of *Robinson v. Cleator* (*o*), wherein the above case is cited, *Margaret Atkinson* by will directed that all the residue of her real and personal estate should remain in trust for her nephew and godson *George Rowland Nicholson* and his heirs; and that her trustees should pay to him half-yearly the interest, dividends and annual proceeds thereof during the term of his natural life. She then proceeded thus: "At the same time, I

(*m*) See also *Nannock v. Horton*, 1784, fo. 89, reported in 1 Cox, C.C. 7 Ves. 391, 398; *Wilson v. Maddison*, 2 Yo. & Coll. (C.), 372. 162.

(*o*) 15 Ves. 526.

(*n*) 21 Jan. 1785; Reg. Lib.

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vest a power in my trustees, that in case they should see it would be for his benefit, to advance him, when they may have it in their power, any part of the principal of such residue for his advancement in life, that they will not withhold from my said nephew such assistance as they may deem necessary; but in case no part should be advanced, then I direct, that my said nephew, leaving lawful issue, that the said residue shall be divided, share and share alike, among such issue as he may have; but in case my said nephew should die, leaving no lawful issue, then I direct the same to remain in trust in like manner for the benefit of his two brothers." The question was, what estate and interest the nephew took in the residue of the real and personal estate? and Sir *William Grant*, M. R., said, he had no objection to make such an order as Lord *Thurlow* had in the case he cited (*p*), which was a confirmation of his own opinion, that the bequest before him could not be considered as absolute property even under the large words "or other occasions."

In *Soames v. Martin* (*q*), the testator directed the interest of a sum of money to be applied for the maintenance and education of his nephew, an infant, but made no disposition of the principal, and Sir *L. Shadwell*, V. C., held that the child was entitled for his life, but that the principal was undisposed of. A similar decision was made by his Honor in *Kilvington v. Gray* (*r*).

It may here be noticed, that a gift for life of the use of consumable articles, is an absolute gift (*s*).

Bequests of
annuities.

2. In the preceding subdivision we have seen that the cases establish the rule of construction, that a gift of the interest or produce of a fund, without limit as to time, amounts to a gift of the capital; but where there are expressions in the will shewing an intention to limit the gift of the interest as to time, that limit will be the measure of the gift. There is, however, a clear distinction between the gift of the produce of a fund without limit as to time, and the gift of an *annuity*. An annuity, as observed by Lord *Cottenham*, in *Blewitt v. Roberts* (*t*), may be perpetual (*u*) or for life, or for any period of years; but in the ordinary acceptance of the term used, if it should be said, that a testator had left another, an annuity of 100*l. per annum*, no doubt would occur of

(*p*) See last case.

(*q*) 10 Sim. 287.

(*r*) *Ib.* 293; see also *Cook v. Bowler*, 2 Keen, 54.

(*s*) *Andrew v. Andrew*, 1 *New Coll. Ch. Ca.* 690, stated *supra*, 277.

(*t*) 1 Cr. & Ph. 280.

(*u*) *Taylor v. Martindale*, 12 Sim. 158.

the gift being an annuity for the life of the donee. It is the gift of an annual sum of 100*l.* that is, of as many sums of 100*l.* as the donee lives years.

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rally.

In *Savery v. Dyer* (v), the gift was of an annuity to *A.* during the life of *B.*, and *B.* having survived *A.*, the question was whether the annuity had ceased, but Lord *Hardwicke* held that it continued during the life of *B.*, his Lordship observing, if one give by will an annuity, not existing before to *A.*, *A.* shall have it for life only.

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phrases.

Interest.

In *Innes v. Mitchell* (w), the bequest was of 200*l.* *per annum* to *A.* for the use of herself and children, which annuity was to be paid out of the testator's general effects, until it was convenient to his executors to invest 5,000*l.* in the funds in lieu thereof, and to the longest liver of her and her children, subject to an equal division of the interest while more than one of them alive. Lord *Eldon*, C., upon appeal confirming the judgment of Sir *William Grant*, M. R., held the annuity for life only.

In *Blewitt v. Roberts* (x), the testator gave his wife 600*l.* *per annum* for her life, and after her death, the said annuity equally to be divided between six persons (naming them), or the survivors or survivor of them. The testator also gave to each of these six legatees 100*l.* *per annum* during their lives with power to leave their said respective annuities at their deaths to any persons they might marry, or any children they might leave; but in case of any of them dying without exercising such power, then to the survivors or survivor of them. Lord *Cottenham*, C., reversing the decision of Sir *L. Shadwell*, V. C., held, that the gifts over of the annuities of 600*l.* and 100*l.* respectively, were not gifts of so much stock in the 5*l.* *per cents.* as would produce these annuities, but gifts of annuities for the respective lives only of the persons to whom they were limited, as tenants in common. His Lordship also held the words of survivorship referred to the death of the widow, the period of division; and, consequently, that those legatees only who survived the widow were entitled.

So in *Wilson v. Maddison* (y), the bequest was of 30*l.* a year from the interest of the testator's funded money in the Bank of *England*; Sir *K. Bruce*, V. C., held that the bequest was not of so much stock as would produce that annual sum, but constituted

(v) Amb. 139.

(w) 6 Ves. 464; 9 Ib. 212.

(x) 1 Cr. & Ph. 280, overruling
Tweedale v. Tweedale, 10 Sim. 453;

see also *Hedges v. Harper*, 10 Jur.
578.

(y) 2 Yo. & Coll. (C.), 372, and
Wroughton v. Colquhoun, 11 Jur.
536.

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an annual charge of 30*l.* upon the funded property, for the life of the legatee.

Notwithstanding, however, an annuity is given to a legatee expressly for his life, yet if it is charged upon a fund which fails during the life of the annuitant, the annuity will also fail with the fund upon which it is charged.

Thus in *Adnam v. Cole* (z), there was a gift of a residue to the executors upon trust to pay the income to the widow for life, subject to the payment thereout of an annuity of 10*l.* to *A.* for his life. After the decease of the widow, among other gifts, the testator directed the payment of the dividends of 1,000*l.* stock in the 3*l. per cents.* to *A.* for his life. Lord *Langdale*, M. R., held, that the annuity of 10*l.* to *A.* ceased on the death of the widow, and that *A.* took the dividends of the 1,000*l.* stock in substitution.

So in *Foster v. Smith* (a), real estates were devised in trust to receive the rents, and thereout to pay to the testator's widow an annuity, and from and immediately after her death, to convey the estates to his three sisters. For some years after the testator's death, the rents of the estates were sufficient to pay the annuity, but afterwards became insufficient, and at the widow's death there was an arrear due to her. Lord *Lyndhurst*, C., reversing the decision of Sir *K. Bruce*, V. C. (b), held, that the annuity was a charge only on the rents which accrued during the life of the widow, and not upon the *corpus* of the estates (c).

In the recent case of *Wroughton v. Colquhoun* (d), Sir *K. Bruce*, held the annuity a charge upon the capital of the estate, in the event of the income failing, and his Honor observed, that he adhered to his opinion in *Foster v. Smith*.

In *Darbon v. Richards* (e), the testator bequeathed leaseholds to trustees upon trust to pay an annuity of 50*l.* to *A.* out of the rents, and accumulate the surplus for the benefit of other persons; the annuitant survived the term, and claimed the annuity out of the accumulations of the surplus rents, but Sir *L. Shadwell*, V. C., held she was not entitled, for the annuity, being only charged on the annual rents, failed on the expiration of the lease.

Where, however, the intention to give a perpetual annuity is apparent on the will, that intention will, of course, prevail, as in

(z) 6 Beav. 353.

(a) 1 Phil. 629.

(b) 2 Y. & Coll. (C.), 193.

(c) See also *Heneage v. Lord*

Andover, 3 Y. & J. 360.

(d) 11 Jur. 536.

(e) 14 Law J., N. S. (C.), 344.

Taylor v. Martindale (*f*), where the testator gave all his property to his wife, subject, among others, to an annuity of 50*l.* a year "for ever," to his brother; and Sir *L. Shadwell*, V. C., held that upon the death of the brother intestate, the annuity passed not to his heir, but to his personal representative, although his Honor admitted, that an annuity, though personal in its nature, might be granted to a man and his heirs (*g*).

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In *Stokes v. Heron* (*h*), on appeal from the judgment of Sir *E. Sugden*, C. (L) (*i*), reversing a previous judgment of Lord *Plunket*, the bequest was not so obvious. There the testator declared his will to be, that whatever he should die possessed of or entitled to, should produce to his wife an annuity of 100*l.*, to each of his daughters 100*l. per annum*, for themselves and their children, to his wife's mother, in addition to her property, so much as would make up to her an annuity of 100*l.*; his will was, that his wife and her mother should enjoy these annuities for their lives, and the life of the survivor of them, so that the survivor should possess an annuity of 200*l.*, to be after the decease of both equally divided between his children *W. M.* and *J. L.* The House of Lords held, that the annuities given by the will were perpetual annuities. Lord *Cottenham*, in giving his opinion, observed, that the annuities were perpetual on two grounds, first, that there was a gift of property producing the amount of the annuities; and, secondly, that the testator dealt with the annuities as being in existence and operative beyond the period of the lives of those who were first to enjoy them; and his Lordship cited *Philipps v. Chamberlaine* (*j*), as having in it circumstances of resemblance with the principal case. Lord *Brougham*, in giving his opinion, discussed at large the question doubted by Sir *E. Sugden*, whether the rule in *Wild's case* (*k*) was applicable to bequests of personalty, and expressed a strong opinion that the cases authorized its application (*l*).

It may here be observed, that when an annuity is charged upon an estate, which subject thereto is given to one for life with remainders over, the Court of Equity will not direct the annuity to be raised by sale or mortgage of the estate, except in cases where the Court finds it necessary to sell or mortgage the estate for payment of debts.

(*f*) 12 Sim. 158.

(*j*) 4 Ves. 51.

(*g*) *Turner v. Turner*, Amb. 782;
Earl of *Stafford v. Buckley*, 2 Ves.
s. 170.

(*k*) 6 Rep. 17.

(*l*) See also *Robinson v. Hunt*, 4
Beav. 450; *Ashton v. Adamson*, 1
Drew. & W. 198.

(*h*) 12 Cl. & F. 161.

(*i*) 2 Drew. & W. 89.

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bequests gene-
rally.

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phrases.

Principal.

These circumstances arose in *Graves v. Hicks* (m), and Sir L. Shadwell, V. C., refused the application from the annuitant for sale of the estate for payment of the arrears then due, observing that no case had been produced as an authority for such a proceeding; and he expressed his opinion that, unless the Court finds it necessary to make a decree for sale of the estate for some other purpose, there was no ground for directing that the amount of the arrears should be raised in the manner proposed; and although these arrears were ascertained, they would be liable, very probably, in the course of a succession of years, to fluctuate; and, therefore, all that could be done then was to let the matter go on, and if the future rents increased, the arrears would be diminished, and might be ultimately paid (n).

The various rules adopted by the Courts in the construction of legacies generally, are equally applicable to gifts of annuities, as will have been apparent in the previous parts of the present work, where they have been alike the subject of those rules. An illustration of this occurs in the recent case of *Roebuck v. Habershon* (o), where in the will of an illiterate person, the bequest was of all the testator had in the world to A., he paying to B. 50*l.* a year for life, and at her death, to pay C. 500*l.*, and D. 100*l.*, and E. 20*l.* a year for life, and 100*l.* in money twelve months after the testator's death. Sir K. Bruce, V. C., held, that as the legacy of 100*l.* to D. was a postponed legacy, he must read the annuity of 20*l.* to E. also postponed until after the death of B.

3. Bequest of
principal does
not carry ar-
rears of interest.

3. In connection with the class of cases noticed in the second subdivision (oo) of the present sub-section, we may add two, which may be considered as the converse; and which decide that the bequest of so much money due upon a particular security will pass the *principal* only, and no part of the interest which may be owing at the testator's death, or at the period when the will was made.

Thus in *Roberts v. Kuffin* (p), Owen Roberts bequeathed to his son T. Roberts 200*l.*, secured by a mortgage upon the estate of M., and all the messuages, lands, and tenements for securing the same. Lord Hardwicke decided that the principal only of the mortgage passed, and not the interest, either from the execution of the will, or the death of the testator, or any other time: his Lordship said, that if a man gave 300*l.* due on bond,

(m) 11 Sim. 551.

(n) See sect. ix., sub-sect. III.,
sub-div. 4, *supra*, 1480.

(o) 10 Jur. 279.

(oo) *Supra*, 1480.

(p) 2 Atk. 112.

that did not carry the interest incurred in his lifetime, because it was quite doubtful what it might amount unto, from the uncertainty of the life of the testator; and the rule of construction was, that where there was a devise in express words, the subsequent general words 'should' not extend it further, than the natural meaning of the preceding ones.

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So in the case of *Harvey v. Cooke* (*q*), it was held upon the general construction of the will that the bequest of "principal monies" did not carry the accumulations of interest which had been directed by the testator.

But in *Woodhead v. Marriott* (*r*), where the testator bequeathed the interest of a fund for the support of his sister for life, and directed the unapplied dividends should accumulate for the benefit of the *persons* entitled to the same after her death: and after her death he gave portions of the fund to particular legatees, and *the remainder* to *J. H.* Lord *Brougham*, C., confirming the judgment of Sir *John Leach*, M. R., held, upon the general construction, that not only the remainder of the principal, but the accumulations, passed to *J. H.*

Secus, if contrary intention apparent.

4. A trust by will to raise a sum of money *out of rents and profits*, is not a charge to be raised out of the corpus of the estate.

4. A charge upon the rents, &c., not raisable out of corpus.

In *Heneage v. Lord Andover* (*s*), the trusts of a term of 500 years were, that the trustees should out of the rents and profits pay certain annuities; and out of the residue raise such sums of money (not exceeding 8,000*l.* in the whole), as should be sufficient to pay the debts of the testatrix or her husband; and, subject thereto, to pay the rents and profits to the persons for the time being entitled to the reversion expectant on the term. It was decided that the charge for debts should not be raised out of the corpus of the estate, but out of rents and profits only. Though in favour of creditors the Court considers a devise for payment of debts out of rents and profits equivalent to a devise of the estate itself, and will direct the estate to be sold for that purpose; yet that has been in cases where the remainderman was tenant in fee or in tail, and therefore liable to the debts sooner or later.

5. We proceed to consider the import of the word "legacy."

This word, though properly applicable to bequests of *personal*

5. "Legacy" will include real estate and annuities.

(*q*) 4 Russ. 34.

(*r*) Coop. C. C. 62.

(*s*) 3 Yo. & Jer. 360, and see

Wilson v. Halliley, 1 Russ. & M. 590.

Construction of estate only, has, nevertheless, been extended to property not bequests generally. technically within its import, in order to effectuate the intention,

Of words and phrases.

“Legacy.”

so as to include *real property* and *annuities*.

Of the former, the case of *Hardacre v. Nash* (t) is an instance. There *Charles Stutfield* bequeathed to his son *Robert* 150*l.*, when of age; and to his daughter *Elizabeth* the like sum when she arrived at twenty-one. He then gave to his wife all the remainder of his estate and effects for life; after which he proceeded thus: “Likewise it is my will and pleasure, and I hereby ordain it, that at the decease of my wife *Elizabeth*, the copyhold estate of mine, situate at *Cockhill, Ratcliffe Highway*, shall fall unto my son *Robert* for his sole use and benefit; likewise a freehold estate at *Poplar, &c.*, at the decease of my wife *Elizabeth*, shall be given to my son *Robert* as aforesaid; likewise I ordain, that after the decease of my wife, that copyhold messuage, &c., situate at *Poplar, &c.* (another house), shall be given unto my daughter *Elizabeth* for her own use and benefit as aforesaid; but in case either or both of my children should die before the decease of my wife, then *those legacies*, which are here left them, shall *return* unto my wife *Elizabeth* for her sole use and benefit, and for her to dispose of freely, as she might think fit.” *Robert* died in the lifetime of the testator’s widow, under age and without issue, leaving his sister *Elizabeth* his heir-at-law. The widow, upon the testator’s death, was admitted to the premises in litigation; and a question arose, whether, in the concluding clause of the will, the words *those legacies* extended to the real estates given to the son, so as to entitle the widow to the remainder in fee; or, whether they were only applicable to the pecuniary legacies before given; and the Court decided that they did. Lord *Kenyon*, C. J., in delivering the opinion of the Court, observed, the word *return* was not indeed very correct; but it was not too much to say, that in this will it referred to part of that general mass before given to the wife (u).

A fortiori, the term “legacy” will be applicable to an “annuity.”

Thus, in *Sibley v. Perry* (v), *Samuel Griffiths* bequeathed to his brother *John Griffiths*, 20*l.* sterling, and his wearing apparel, and also an annuity of 50*l.* a year for life; and, after giving other legacies, bequeathed his residuary estate in trust, to be laid out in lands for a charitable use (which was void); and directed, that if any of the legacies or bequests before given or made by him,

(t) 5 T. R. 716.

Burr. 268.

(u) And see *Hope v. Taylor*, 1

(v) 7 Ves. 522.

should lapse or be void from the death of parties, or on account of the Mortmain Act, or for any other cause, his trustee should divide the same among the "*other legatees*, in proportion to the several bequests before made to them." The question was, whether the annuitant was entitled under the above bequest, to a proportionate share of the residue; and Lord *Eldon* held, that the annuitant was clearly entitled; observing, "the rule is, that an *annuitant* will fall under the general character of *legatee*, unless there be something to shew that the testator distinguished between them, as in *Nannock v. Horton* (*w*). In that case, I founded myself upon the case of the Duke of *Bolton's* will, in which Lord *Thurlow* held, that legacies being charged upon the real estate, annuities were charged upon the real estate, as legacies."

Construction of bequests generally.

Of words and phrases.

"Legacy."

In the following case of *Nannock v. Horton*, referred to by Lord *Eldon*, we find, that, notwithstanding the word "legacy" will comprehend annuities, yet the extent of the meaning will be narrowed, when the intention manifestly requires it.

In that case, *Thomas Norman* gave several persons a mourning ring each, of the value of two guineas; and, after giving several other legacies and annuities, he declared that the legacies and annuities thereinbefore given, should vest immediately after his death in such of the *legatees* and *annuitants*, as should survive him. He then bequeathed to his son, *Robert Norman*, 4,000*l.* and then gave him during his life the interest and dividends of 8,000*l.* (by codicil altered to 6,000*l.*) three *per cent.* consolidated Bank annuities, and directed that the stock should be invested in the names of his executors, who after his son's death should transfer 6,000*l.* (by codicil altered to 4,000*l.*) part of the stock to such person, &c. as his son should appoint, and pay the remainder to and among the several persons thereinbefore mentioned, to whom he (the testator) had given "*legacies*," rateably and in proportion to their *legacies*. The testator also directed his executors to purchase in their names the sum of 4,000*l.* three *per cents.*; and, in the event of the death of two natural children of his late son, *J. Norman*, dying under twenty-one, further directed that it should be paid to and among the persons thereinbefore named, to whom he had given *legacies* (his son *Robert Norman* excepted), in the like manner as to the shares of such capital stock of either of them dying before attaining such age (except as aforesaid). The testator also gave the money to arise from the sale of a freehold house, in the event of *J. H. Norman*

(*w*) The next case, 7 Ves. 391.

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dying under twenty-one, to be divided in a similar manner. The residue of his estate and effects the testator also bequeathed unto and among the several *legatees* ~~therein~~before named, in proportion to their several *legacies*, &c. (as before). *R. Norman*, the testator's son, made a will, but without exercising his power. Two questions arose; *first*, whether the personal representative of *Robert Norman*, in respect of his legacy of 4,000*l.* was entitled to a share of the 2,000*l.* the surplus of the stock, over part of which he had the power of disposition. *Secondly*, whether the annuitants and the specific legatees of rings, &c. were entitled to participate in the residue with the *general* legatees. Lord *Eldon* was of opinion on the former question, that it was not the testator's intention, that *Robert Norman* should take a share in the 2,000*l.*; his Lordship thought that as at the time of distribution, the son would be dead, the testator appeared to have thought he had so given that surplus as to exclude *Robert*; and that that inference was confirmed by the subsequent bequests, where a similar division was to take place; and *Robert* was *expressly* excepted, because the testator conceived, in the mode of giving those bequests, *Robert* was not sufficiently excluded. Upon the second point, his Lordship was of opinion, that the word *legacies* would take in all kinds of legatees, and that the annuities were in a sense legacies; yet, from the whole context, he thought they were not intended to take a share; and, although his Lordship thought, that the specific legatees were not intended to take any share, still they were legatees, and there was no phrase to characterize them, upon which he could conjecture, as he could upon the word "annuities:" and that the best construction was, to give the word all the operation it would have, unless there were something in the will to narrow its import. The annuitants, therefore, were excluded; but the specific legatees were not.

So in *Cornfield v. Wyndham* (*x*), upon the construction of the whole will, the word *legacies* was held not to include annuities, Sir *K. Bruce*, V. C., observing that "*legacies*" was a word under which annuities bequeathed might, without impropriety, be comprised. It had familiarly and colloquially a more restricted meaning. It might receive, according to circumstances, either the more general or the more restricted sense.

6. "All my
lands, &c." will
not carry lease-
holds, &c.
where.

6. We next consider whether *leasehold* lands will pass under the words "*all my lands and tenements*."

(*x*) 2 Coll. (C.), 184.

It was resolved by all the Judges, *absente Richardson*, in the case of *Rose v. Bartlett* (y): that if a man, having lands in fee simple and lands *for years*, ~~and~~ devise *all his lands* and tenements, the lands *in fee simple only* and *not for years*, will pass to the devisee; but, *contra*, if the devisor have only lands on lease or leases for years, and no property in fee simple; for if the leasehold lands were not allowed to pass, the will would have no effect and be void. This general rule has been acted upon and acknowledged in several instances, as will appear from the cases cited below (yy); and, although it appears to have been misunderstood and disapproved by some modern Judges, who have been anxious to lay hold of any expression in the will, to exclude its operation, it is now well established; and the following cases, with the exception perhaps of *Pistol v. Richardson*, form exceptions.

Construction of bequests generally.

Of words and phrases.

"All my lands, &c."

In *Addis v. Clement* (z), *Thomas Addis*, being seised in fee simple of some estates, and possessed of a lease for years, held of the church of *Hereford*, of other lands in *D.* all in the possession of *A.* and *B.* at certain rents; and it being difficult to distinguish the freehold from the leasehold, in consequence of the long unity of possession, devised all his messuages, lands and tenements, in the parish of *D.*, which he then stood seised *or possessed of, or any ways interested in*, and which were in the possession of *A.* and *B.* unto his wife for life, with remainder to his brother and the heirs of his body, if then living; with other remainders not properly applicable to the settlement of leasehold property. The question was, whether the leaseholds passed: and Lord *King* held that they did; observing, that the words "possessed of or interested in," properly referred to leasehold estates; and he distinguished the case from *Rose* and *Bartlett*, in which those words were not to be found; that the leasehold being always renewable, the lessee (the testator) considered himself as having a perpetual estate in the lands, or a kind of inheritance.

The case of *Pistol v. Richardson* (a), next stated, which received a contrary decision by Lord *Mansfield*, is so extremely like the last, that if it were not from the circumstance of the great reluctance with which Lord *Mansfield* determined that the lease-

(y) Cro. Car. 292.

Pul. 315, S. C.; 5 Ves. 476.

(yy) *Day v. Trig*, 1 P. Wms. 286; *Davis v. Gibbs*, 3 Ib. 26; *Knotsford v. Gardiner*, 2 Atk. 450; *Chapman v. Hart*, 1 Ves. sen. 271; *Thompson v. Lady Lawley*, 2 Bos. &

(z) 2 P. Wms, 455; see also *Hobson v. Blackburn*, 1 Myl. & K. 571.

(a) 2 P. Wms. 459, in note to the preceding case.

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holds did *not* pass, and the case of *Addis v. Clement* not having been cited, it should seem the latter case must have been considerably shaken. Subsequent decisions, however, as will appear in the ensuing pages, have followed *Addis* and *Clement*, not considering themselves bound by *Rose v. Bartlett*, except where the words of the devise were precisely the same.

In *Pistol v. Richardson*, the testator being seised of freehold estates of considerable annual value, and being also possessed of two farms held under leases for a term of one thousand years each, gave, devised and bequeathed all his manors, advowson, &c., and all his messuages, lands, tenements and hereditaments whatsoever and wheresoever, which he was *seised of or interested in or entitled to*, lying and being within the several counties of *N.*, *C. W.* and *Y.* to his son for life, with impeachment for wilful waste, with remainders to the heirs of his body. The case was twice argued in the King's Bench, and the Court, upon consideration, and with some reluctance, determined that the leaseholds did not pass; Lord *Mansfield* observing, that although the words of the devise were very comprehensive, yet a system of legal construction had been established by former cases, (especially *Rose v. Bartlett* and *Davis v. Gibbs*), which precluded them from considering the intention of the testator on the words of the devise, as they otherwise might have done, and bound them in their decision.

It may be strongly inferred that the decision of the Court in the last case would have been the other way, had a single authority been adduced in support of the better judgment of the Court; and it is to be regretted that the case of *Addis v. Clement* was not cited, as it would have removed the difficulty which the Court felt from the established rule of construction.

The case of *Addis v. Clement* is confirmed by that of *Sir James Lowther v. Lord Charles Cavendish* (b). There Sir James Lowther having estates of inheritance and leaseholds in *Cumberland*, devised thus: "I give all my manors, lands, tenements, mines of coal and lead, rents and hereditaments whatsoever in *Cumberland* to *J. Lowther* (the plaintiff) in tail. And whereas I am owner of several burgage tenures in *Cockersmouth*, it is my will, that they shall not be entailed, as I have done my *other* estates in *Cumberland*; and therefore I devise them to Sir *William Lowther* and his heirs;" and the testator appointed Sir *William* executor and residuary legatee. The question was whether the leaseholds

(b) Amb. 356.

passed to *J. Lowther*; and Lord Keeper *Henley* determined that they did: observing, with reference to the rule in *Rose v. Bartlett*, that he could see no reason why the words "lands and tenements" should not include leaseholds, as they had been held to do, where other words were added; as in *Addis v. Clement*, "lands in which he was any way interested." He also remarked, that the words "*mines and rents*" were material to pass the leaseholds, as it would be strange to suppose the testator to devise the profits, without the lands from which they flowed. The decree was affirmed in *D. P. (c)*.

Construction of bequests generally.

Of words and phrases.

"All my lands, &c."

Again in *Turner v. Husler (d)*, the testator being seised of tithes in fee, and possessed of leases of tithes perpetually renewable without fine, devised all his lands, tenements, tithes, &c. to the defondant; who being in possession, a bill was filed by the personal representative claiming the leasehold tithes, insisting that the freehold tithes only passed; but *Eyre*, Baron, dismissed the bill, observing, that he did not mean to deny the authority of *Rose v. Bartlett*; but he could not build upon it, and take the construction for tithes in the principal case, which was there applied to lands; and that the case of *Addis v. Clement* was argued from the intent; that the limitations in the principal case were fit for an inheritance, but that it was to be inferred thence that the power of renewal had made the testator forget he had not the inheritance (*e*).

So also in *Lane v. Earl of Stanhope (f)*, *Henry Bosville*, being seised and possessed among other hereditaments, of a farm partly freehold and partly renewable leasehold in the parish of *Buckland* and *Buckland Dane* in *Kent*, the whole of which he had leased to *J. Smith* for twenty-one years as one entire farm, at the yearly rent of 70*l.* reserved to *H. Bosville* and his heirs, and which had immemorially been let as one entire farm, devised all his manors, messuages, or tenements, houses, *farms*, lands, woodlands, hereditaments, and real estate whatsoever and wheresoever, unto *Richard Bettinson*, and his assigns, *sans waste*, with remainders to trustees to preserve, and to the first and other sons of *R. Bettinson* in tail general successively, with similar remainders over to *William Lane* and his first and other sons in tail (who died without issue in the lifetime of *R. Bettinson*); with remain-

(c) See Lord *Eldon's* observations on this case in *Thompson v. Lady Lawley*, 2 Bos. & Pul. 315.

(d) 1 Bro. C. C. 79.

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(e) See Lord *Eldon's* remarks on this case, *Thompson v. Lady Lawley*, 2 Bos. & Pul. 316.

(f) 6 T. R. 345.

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ders over to the plaintiff *Thomas Lane* for life, with divers remainders over. The testator bequeathed the residue of his personal estate to *R. Bettinson*, whom he appointed sole executor. After the testator's death, *R. Bettinson* entered into possession, and let the farm in question as one farm, at an entire rent reserved to him and his heirs. Upon his death, without issue and intestate, administration was granted to his only sister *Helen Bettinson*, who died leaving a will and codicils, by which she appointed the defendants *Lord Amherst*, *M. Lambert*, and *Earl Stanhope* her executors: the two first of whom alone proved, and procured letters *de bonis non* of *R. Bettinson*, and administration of the effects of the testator *Henry Bosville* unadministered by *R. Bettinson*. Upon the death of *R. Bettinson*, *T. Lane* (the plaintiff) became entitled to an estate for life in the estates devised by the will of *H. Bosville*. The defendants, as personal representatives of *R. Bettinson*, claimed the leasehold part of the farm at *Buckland* and *Buckland Dane*, as constituting part of the personal estate of *R. Bettinson*, the residuary legatee of the testator *Henry Bosville*. The plaintiff claimed the leasehold as well as the freehold part of the farm under the will; and the question was, whether the word "*farms*" included both. Lord *Kenyon*, C. J., determined in the affirmative; admitting that the limitations were inapplicable to personal estate; but that that was not sufficient to preclude the idea that the testator intended the leaseholds should pass. His Lordship said he did not wonder that the Court determined the case of *Pistol v. Richardson* (g), with reluctance; and he lamented *Addis v. Clement* was not cited. With reference to the case before him, his Lordship observed, that the word "*farm*" meant, that which was held by a person who stood in the relation of tenant to a landlord, and that the extrinsic circumstances weighed strongly in the present case; and, considering the residuary clause which enumerated only personal chattels, and that the testator did not intend to die intestate as to any part of his property, he thought the construction the family had put upon the whole will was the true one.

The preceding case furnishes strong evidence of intention that the leasehold should pass with the freehold. They had been immemorially blended; the rent had been reserved to the lessor and his *heirs*; from which it may be inferred, the testator conceived the whole as his *inheritance*. The premises were held with a right of renewal. The first taker of the real estate was

(g) *Supra*, p. 428, 1490.

also the residuary legatee of the leasehold estate. If, therefore, the testator did not intend the freehold and leasehold should go together, he must have had this special intent that the first taker should have an estate for life in the freehold part, and under the residuary clause an absolute interest in the leasehold, which, upon the death of the first taker, might give rise to a separation of the different parts of a farm stated to be incapable of being distinguished. Added to the above reasons, the circumstance of their being devised as one entire farm seems conclusive.

Construction of bequests generally.

Of words and phrases.

"All my lands, &c."

To the preceding, the recent case of *Goodman v. Edwards* (h), may be added as an instance in which the Court considered the intention apparent, that leasehold property, blended with the freehold, should pass under the words "*real estate*." The testator, among other freehold estates, devised all his several closes or inclosed ground of arable and pasture land *containing by estimation one hundred acres* or thereabouts, situate and being at *Everdon*, unto and to the use of his wife during widowhood; and after her death or second marriage he devised "*all the said hereditaments and real estates* unto and to the use of his nephew the plaintiff and his heirs for ever, subject to the mortgage debts thereon." The testator gave the residue of his personal estate to his wife absolutely. Of the hundred acres mentioned in the will, forty were leasehold; and the question upon the second marriage of the widow was whether these forty acres passed under the devise over to the nephew, or under the residuary bequest of the personal estate to the widow. It was urged on behalf of the widow, that according to the case of *Rose v. Bartlett* (i), the leasehold would not pass, but Sir *John Leach*, M. R., decided that upon the whole will it was plain the testator intended to pass the forty acres under the description of "*real estate*."

In the case of *Thompson v. Lady Lawley* (j), the testator, being seised in fee of freehold, and possessed of leasehold estates, devised his manor of *Wheldrake* in the county of *York*, and *all other* his manors, messuages, lands, tenements and hereditaments, to trustees and their heirs, to the uses upon the trusts, &c. therein mentioned; and after limiting his manor of *Wheldrake* and other hereditaments in the parish of *Wheldrake* for securing certain rent-charges, proceeded to limit the uses, as, to, for or concerning the said manors, &c. so charged with the annuities, "and as, to, for or concerning all his manors, messuages, lands, tenements and

(h) 2 M. & K. 759.

(i) *Ubi supra*.

(j) 2 Bos. & Pul. 317; 5 Ves.

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hereditaments, with their rights, members and appurtenances, in the said county of *York or elsewhere in Great Britain*, to the use of his first and other sons in tail male," with divers remainders over. Lastly, the testator bequeathed all his monies, securities for money, goods, chattels and effects, and all other his personal estate not thereinbefore disposed of or to be disposed of by codicil, to his brother *Richard Thompson*, and his sister *Lady Lawley*, in equal shares; and appointed them executor and executrix of his will. The question for the opinion of the Court was, whether the leaseholds passed under the general devise of the manors, &c. in *Yorkshire or elsewhere in Great Britain*. The Court decided in the negative; being of opinion that there was not in other parts of the will sufficient manifestation of the testator's intention that the leaseholds should pass by the general devise. Lord *Eldon*, C. J., at the conclusion of his elaborate judgment, observes; "The rule (*j*) in *Rose v. Bartlett* is a rule, which has been acknowledged for ages, and upon which I shall act, until I am informed by the highest authority that I am no longer to regard it. Till I shall be so informed, I shall substantially regard it in judgment, for I think it better to overrule it altogether, which I must not do, than to deny to it its effect upon grounds, which do not completely satisfy my mind as solid and safe grounds of distinction" (*k*).

We may here refer the reader to the case of *Hoste v. Blackman* (*l*), though it does not strictly fall within the present class. There, a devise of "all and every my freehold messuages, lands, tenements and hereditaments," was held to be satisfied by freehold houses of the testatrix, and not considered to be an appointment, under a power vested in her, of money to be laid out in land.

To the preceding cases that of *Dixon v. Dawson* (*m*), stated in a former chapter, may be added, in which case the general words were aided by other parts of the will shewing an intention to pass the leaseholds; also *Arkell v. Fletcher* (*n*) where the freehold and

(*j*) It may here be noticed that the rule in *Rose v. Bartlett*, is applicable only to leaseholds for years; since leaseholds for lives, though granted to the lessee his executors and administrators, are nevertheless freehold, even in the executor taking them as special occupant; and they will pass under a general devise of

real estate. *Fitzroy v. Howard*, 3 Russ. 225; *Doe v. Easley*, 1 Cr., M. & R. 823.

(*k*) See also *Doe v. Ludlam*, 7 Bing. 280, per Tindal, C. J.

(*l*) Madd. & Geld. 190.

(*m*) 2 Sim. & Stu. 327, 337; *supra*, Vol I. Chap. IX, s. III. p. 529.

(*n*) 10 Sim. 299.

leaseholds were occupied as one farm, but the limitations of the will were applicable to freeholds only. In *Stone v. Greening* (o), the testator described the lands in the county of *B.* as freehold, it was decided that leasehold in the county of *B.* did not pass. The rule of construction established by *Rose v. Bartlett*, and the subsequent train of authorities now only applies to wills made before the 1st of *January*, 1838, for by the 26th section of the 1 Vict. c. 26, a general devise of lands in wills made upon or since that day, will include the testator's leaseholds as well as his freeholds unless a contrary intention appear.

Construction of bequests generally.

Of words and phrases.

7. We next consider how a bequest to a *parish* church is construed.

7. To parish church, or to the parish, or to the inhabitants of a parish.

The following case shews that such a bequest passes the gift to the churchwardens of the parish named, to be applied in adorning and repairing the church, and not to the parson; the former being a corporation to take money and personal estate, the latter a corporation only to hold lands, to the use of the church.

Thus, in *Attorney General v. Ruper* (p), the testator bequeathed 500*l.* after the death of his wife, to the parish church of *St. Helens, London*, which was an impropriation. Upon the question, whether the vicar or stipendiary of the church should have the legacy after the widow's death, or whether it should go to the churchwardens, for the repairs and improvement of the church: Sir *Joseph Jekyll*, M. R., decreed that the legacy should not go to the vicar, but to the churchwardens, for the reparations of the church, and the improving and adorning the same.

In the *Attorney General v. Vivian* (q), the lands were devised to the churchwardens, &c. of a parish church after a charge for a superstitious use, and for repairs, &c. of the estate "to the use of the said parish church, at the discretion of the parson, churchwardens, &c. and their successors;" and Lord *Gifford*, M. R., observed that *primâ facie* it was not a due application of the charity, to mix up the rents with the produce of parochial rates, so as to form a general fund, out of which the repairs of the church and other parochial expenses were defrayed.

But a bequest to the "parish," without saying to what use, has been construed a bequest to the poor of the parish (r).

(o) 13 Sim. 390; See also *Parker v. Marchant*, 2 Yo. & Coll. (C), 279.

(q) 1 Russ. 226.

(r) *West v. Knight*, 1 Ch. Ca. 134.

(p) 2 P. Wms. 125.

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In *Rogers v. Thomas* (s), the bequest was of "all which might remain of my money to the inhabitants of T.," and it was held that the parties found by the Master to be such inhabitants, were entitled to the residue of the testatrix's personal estate.

8. Mainte-
nance.

8. It appears from the case next stated, that a legacy, given to a mother for *maintenance* of her children, is not by the terms of the bequest applicable to their *education*.

Thus in *Collier v. Collier* (t), Sir George Collier gave his wife 400*l.* a year in addition to 500*l.* a year, to which she was entitled by her marriage settlement, "in consideration of the expense and care she will incur in the *maintenance* of our children." There were six children, two sons and four daughters; and the question was whether the annuity of 400*l.* was applicable to their *education*, as well as support; and it was determined in the negative, as it could not be presumed the testator meant to expose his wife to the temptation of spoiling the boys by keeping them at home.

A gift for maintenance is in general a gift for the life of the legatee.

In *Webb v. Kelly* (u), Sir L. Shadwell, V. C., held that a gift of the rents of a freehold estate during the life of A., to be applied in equal shares for the maintenance of B. and C., was an absolute gift to B. of her moiety for the life of A., and that B. dying in A.'s lifetime, her representatives were entitled accordingly to B.'s moiety until the death of A.

In *Soames v. Martin* (v), his Honor decided that the gift of the interest of a fund for the maintenance of A., was a gift of that interest for his life, the principal being undisposed of.

9. To a legatee
to apprentice
him, &c.

9. If a bequest be to, or in trust for, a legatee, to put him out apprentice, or to advance him in business or a profession, it is an absolute bequest to such legatee; so that, if he die before it be so applied, it will belong to his executor.

In *Nevill v. Nevill* (w), the bequest was of 500*l.* to the eldest son of John Nevill to be begotten, to place him out apprentice. John Nevill, after the testator's death, had a son, who filed his bill for the legacy. It was objected, that the legacy being given for a particular purpose, he was not entitled until fit to be placed out; but the legacy was decreed to be paid.

(s) 2 Keen, 8, and as to the words 'whatever remains of money,' see *Dowson v. Gaskoin*, Ib. 14.

(t) 3 Ves. 33.

(u) 9 Sim. 469.

(v) 10 Sim. 287; see also *Kilvington v. Gray*, Ib. 293, *et supra*, p. 1445, 1446.

(w) 2 Vern. 430.

In *Barlow v. Grant* (*x*), a legacy of 30*l.* was given to an infant to bind him apprentice; the infant attained the age of seventeen, and died, having made a will and appointed his executor: and it was held a good disposition of the legacy, although the infant died before he attained a competent age to be placed out apprentice.

Construction of bequests generally.

Of words and phrases.

In *Cope v. Wilmot* (*y*), the testator directed his trustees to pay any sum, not exceeding 3,000*l.*, for the advancement of the plaintiff in any business, art, or profession, or any civil or military employment: and it was held by Sir *Thomas Sewell* to be a gift of the money in all events to the plaintiff, either by advancement or in money (*z*).

In *Laing v. Laing* (*a*), the testator gave a sum of stock to *A.*, to be paid or transferred to, or settled upon her by his trustees and executors, by such deed as they in their judgment should think most proper, on her attaining twenty-one. *A.* married in the testator's lifetime, and after his death attained twenty-one. The trustees proposed a settlement upon *A.* for her separate use for life, and after her death upon her husband for life, and then upon her children. Sir *L. Shadwell*, V. C., rejected the proposal of the trustees as not consistent with the words of the will, and ordered the fund to be transferred to *A.* for her separate use on her separate receipt.

10. In the next place we observe, that a bequest to *A.* for life, and after the death of *A.* and *B.*, to *C.*, does not, without other evidence of intention, by itself, give *B.* a life interest by implication; for it is a well settled rule of construction, applicable as well to real as personal estate, that where an estate or interest is created by implication, it must be a necessary implication.

10. To *A.* for life, and after the death of *A.* and *B.* to *C.*

Thus, in *Brown v. Clark* (*b*), *George Hoffman* bequeathed the interest of one moiety of the residue of his personal estate to his brother, *William Hoffman*; and after the death of his said brother and his wife, he gave the principal equally to be divided among *William's* children. *William* died in the testator's lifetime, leaving his wife, who survived the testator; and the question was, whether the wife was, on that event, entitled to receive

(*x*) 1 Vern. 254; also *Burton v. Cooke*, 5 Ves. 461.

(*y*) Amb. 704; *Isherwood v. Payne*, 5 Ves. 677.

(*z*) See the cases cited at the end of the report; see Vol I. Chap. X.

on Vested Legacies, sect. vii. sub-sect. 5, p. 646.

(*a*) 10 Sim. 315.

(*b*) 3 Ves. 166, or *Hoffman v. Clark*, S. C.; see also *Adams v. Adams*, 1 Hare, 537.

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rally.

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the interest for her life by necessary implication; and Lord *Alvanley* was of opinion that she was not; observing, that it was an absolute gift to the husband of the interest till the death of himself and wife, that the husband's interest during her life would have been transmitted to his executors; but, as he died before the testator, the legacy lapsed.

The same rule holds in devises of real estate, with this exception, that where the devise is to the *heir* after the death of the wife, the implication is considered to be *clear*, that the testator's intent was, that the heir should not take till after her death (c).

For cases of legacies by implication, the reader is referred to the preceding section 7 of this chapter.

11. "At discretion."

11. We shall here adduce some instances of bequest to one or more legatees of legacies *at the discretion of trustees*; or, *as they shall think fit*.

In *Wainwright v. Waterman* (d), *Arnold*, being in partnership with *Pearkes*, and having power under the partnership articles to nominate a person to succeed him, by will directed his executors to carry on the trade, and bequeathed to them his share of the capital, with a power to dissolve the partnership, or nominate any other person to succeed him or them. The testator by codicil desired, that if his executors continued the trade, and his grandson *Thomas* and *John Wainwright* attained twenty-one, his executors, or the survivor of them, would nominate *Thomas* and *John Wainwright* partners in his place; and the testator bequeathed to his grandsons 4,000*l.* a piece, payable out of the profits of the trade, so soon as they became partners, but directed such legacies to sink into the estate, if *Thomas* and *John Wainwright* died before twenty-one, or declined the partnership. In another codicil, the testator expressed himself thus: "It shall be entirely in the discretion of my executors, whether to appoint *Thomas* to be a partner or not, any direction in my will or codicil to the contrary notwithstanding; and if they do not think proper to appoint, the legacy given to him to be void." Both grandsons, having attained twenty-one, commenced a suit in equity against the executors, to be admitted partners from the day they attained twenty-one, for an account of the profits

(c) *Smarthill v. Schollar*, 2 Freem. (ed. 1826), 458; *Willis v. Lucas*, 1 P. Wms. 472; *City of London v. Garway*, 2 Vern. 572; *Upton v.* Lord *Ferrers*, 5 Ves. 806; *Dashwood v. Peyton*, per Lord *Eldon*, 18 Ves. 40, 48. (d) 1 Ves. Jun. 311.

from that period, and for payment of their legacies. One of the executors stated, that he had always been desirous for their admission in the partnership, but the other refused, under an idea, that the terms of the will and codicil were not compulsory. But Lord *Thurlow*, C., was of opinion, that, as there was no declaration by the executors, either before or at the time the grandsons attained twenty-one, that they were unfit to be admitted; and there was a difference of opinion among the executors upon the subject, the legatees were entitled to the relief they sought in its full extent.

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tion."

In *Wareham v. Brown* (e), Sir *Anthony Brown* bequeathed 400*l.* a piece to two of his sisters; and to his third sister what his executors should think fit. The Court decreed that the third sister should have 400*l.* also, if the estate of the testator would afford it to place her upon an equality with her other sisters. In Mr. *Raitby's* valuable edition of *Vernon*, it is stated that the point respecting the legacies to the testator's sisters does not appear.

But in *French v. Davidson* (f), where the testator *Richard Shaw* directed that his executors should pay an annuity of 600*l.* to Mrs. *Bogle French*, "unless circumstances should render it unnecessary, inexpedient, and impracticable," Sir *John Leach*, V. C. was of opinion, that by those words must be meant, if circumstances, *in the opinion of the executors*, should so render it; and that, if they had come to a conclusion, that circumstances had rendered the payment unnecessary, inexpedient, and impracticable, a Court of Equity could not have controlled their judgment, unless it appeared that they had acted *malá fide*.

In *Supple v. Lowson* (g), *Jane Wright* gave the residue of her personal estate to her brother, the defendant, in trust to dispose thereof *unto and amongst such of her relations*, at such times, and in such manner and proportions, as he *in his discretion*, should judge most proper. Sir *Thomas Sewell*, M. R., was of opinion, that the defendant had a discretionary power, and that the relations at large were the objects of the testatrix's bounty, and not the next of kin only.

In *Waldo v. Caley* (h), *Peter Waldo* bequeathed the residue of his personal estate to trustees and executors, upon trust to pay

(e) 2 Vern. 153; see also *Lewis v. Lewis*, 1 Cox, C. C. 162, *supra*, p. 1479.

(f) 3 Mad 396.

(g) Amb. 729.

(h) 16 Ves. 206; see also *Horde v. Earl of Suffolk*, 2 M. & K. 59.

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the interest to his wife for life; enjoining her to co-operate with his trustees in carrying his wishes into execution; and directing her, with the advice and assistance of his trustees, to lay out annually, during her life, one moiety in promoting charitable purposes, as well of a public as private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen or otherwise, as his wife should judge most worthy and deserving objects, giving a preference always to poor relations. Sir *William Grant*, M. R., decided that the object was charity in general, with a preference, but not confined to poor relations: the distribution to be at the discretion of the wife with the advice and assistance, but not subject to the control, of the trustees (i).

But where a residue is given to trustees upon trust, to dispose of it at such times in such manner, and for such purposes as they shall think fit, the legacy is void for uncertainty, and belongs to the next of kin (j).

12. Power to
invest in secu-
rities at discre-
tion.

12. Of instances, where a *discretion* is given to executors and others to *invest money on securities*.

In *Forbes v. Ross* (k), the testator directed his trustees (whom he appointed executors) to lay out and employ the residue of his estates and effects in the purchase of lands, or upon *heritable or personal securities at such rate of interest as the said trustees should judge reasonable*. The executors lent the fund to one of themselves on bond at four *per cent.*, when five *per cent.* might have been made by heritable or government securities; and Lord *Thurlow*, C., held, that the trustees were at liberty, using their discretion soundly and fairly and honestly, to lend it to any body they might suppose would give a reasonable interest for it, considering at the same time the degree of responsibility of the person to whom it was lent; but though the *personal* security was within the exercise of their authority, yet that it was wrongly exercised in favour of one of themselves; for wherever a trustee contracted with himself he could not spare himself, and therefore as it appeared that five *per cent.* might have been made, the trustee must be charged with interest for the money in his hands at that rate.

(i) See *De Maneville v. Crompton*, 1 Ves. & Bea. per Lord *Eldon*, 359; see Vol. I. Chap. II. sect. v. div. 2, p. 107, and sect. x, div. 2, p. 142.

(j) *Fowler v. Garlike*, 1 R. & M. 232.

(k) 2 Cox, 113.

But it should seem that unless *personal security* is expressed or clearly implied in the authority to the trustees or executors, though the words were general enough to comprehend all securities, it would not be a sound exercise of their discretion to invest the funds in *personal security*.

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Discretion to invest in securities.

Thus in *Wilkes v. Steward* (l), the will empowered the executors to lay out a legacy in the funds, "or on *such other good security as they could procure and think safe*." The executors swore in their answer, that they had laid out the legacy on good and sufficient security, but did not state what; and Sir *William Grant*, M. R., was clearly of opinion that the defendants (the executors) had no power to lay out the money upon personal security; that it was like trustees to sell, who could not be justified in selling for any other price than the best price that could be got for the money (m).

But where the authority expressly mentions real or *personal security*, it does not enable the trustees to lend trust money to a trader, upon his bond, by way of *accommodation*.

Thus, in *Langston v. Ollivant* and others (n), *John Ollivant* bequeathed 500*l.* to the defendants his executors, in trust to place out the same *upon real or personal security as should be thought good and sufficient*, to the use of his daughter *Betty* for life, and afterwards to her children. The will contained a clause that the trustees should not be answerable for any loss without their wilful neglect or default. Upon the marriage of the testator's daughter with *John Langston*, the executors lent him the 500*l.*, with other monies of their own upon his bond. At the time of his marriage and of these loans, there was evidence of *John Langston* being a trader in good credit. He afterwards became bankrupt, and a bill was filed by the infant children against the trustees to make them responsible. Sir *William Grant*, M. R., was of opinion, that the authority given them did not extend to an *accommodation*, which was what had there taken place. It was evident that the defendants had, upon the marriage, been induced from relationship to accommodate the bankrupt with this loan, which they had no power to do; and therefore they must be responsible for the loss.

(l) Geo. Coop. C. C. 6.

(m) See also *Walker v. Symonds*, 3 Swans. 81, per Lord *Eldon* and *Adie v. Feuilletau*, note, 3 Swans.

84, and the cases in note to *Harden v. Parsons*, 1 Eden. 150.

(n) Geo. Coop. C. C. 33.

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13. In like
manner, in
manner afore-
said.

13. Of construction of words of reference, "*in like manner*," "*in manner aforesaid*."

In *Shanley v. Baker* (o), the words "*in like manner*," were construed to apply not to the quantity, but the *quality* of the interest of the legatees in the gift referred to.

In that case, *Richard Rowton* bequeathed leasehold houses to trustees, in trust to apply the rents for the benefit of his granddaughter *Sarah Smith*, during minority, and to permit her upon her attaining twenty-one, to receive the rents of those houses for her sole and separate use, and not to be subject to the debts, &c. of any husband she might marry, for which her receipt alone was to be a sufficient discharge to the trustees. The testator also gave to the same trustees other leasehold houses, upon trust to pay the rents to the separate use of his daughter *Sarah Shanley for life*, with a similar direction that her receipt alone should be a sufficient discharge to the trustees, and that such rents should not be subject to the debts, &c., of her present or any future husband; and after her death, in trust to apply the rents for the benefit of the child or children of *S. Shanley*, as therein mentioned; but if there should be no such child or children who attained twenty-one, in that event the testator declared that the rents of the leasehold premises, devised to *S. Shanley* and her children, should be considered as part of his residuary estate. The testator then bequeathed all his residuary estate and effects to the trustees upon this special trust; that is to say, to and for the use of my said granddaughter *S. Smith*, and my daughter *S. Shanley*, to be divided between them share and share alike, *and to be paid and applied in like manner* for their use and benefit, as I have directed the rents and profits of my leasehold premises hereinbefore settled upon them; and my will is, that their receipts for such their respective moieties of such residue shall be sufficient discharges for the same to my trustees and executors, or the survivor of them. Upon the question, whether the legatees *Smith* and *Shanley* were entitled to the residue *absolutely*, or for their *lives* only, Lord *Alvanley* decided that the expression "*in the same manner*," only meant for their separate use, and not for the same interest; and that that was a fair construction, as both the bequests were to the *separate use* of the legatees; but they could not take the same estate in the residue as *S. Shanley* took in her leasehold houses, as they were

(o) 4 Ves. 732; see also *Grassick v. Drummard*, 1 Sim. & St. 517.

directed to *sink into the residue*, in case there should be no child attaining twenty-one.

In *Milsom v. Audry* (p), the words "*in manner aforesaid*," were construed to apply to the *quantity* of interest. There *Isaac Moody* bequeathed the interest of his residuary personal estate to his nephews and nieces, sons and daughters of his late brothers and sister, *Matthew*, *David*, and *Hannah*, equally *for their lives*; the children of his said brothers and sister to have only their father's and mother's share between them: and after the death of either of his nephews and nieces, he directed the trustees to call in and pay the principal unto the children of such of the nephews and nieces as should happen to die, in equal shares; and if any of his nephews or nieces should happen to die without leaving a child or children, then the testator declared that the share or shares of him, her, or them so dying, should go to and among the survivors or survivor *in manner aforesaid*. *Hannah* married *Ovens* and had issue, *Jacob*, who died first without issue: *John*, who died next, leaving issue *Jane Short*; *Samuel Ovens* living and unmarried; and *Hannah Coe* who died without issue. The question was, whether the assignee of the purchaser of the interest of *Samuel Ovens* under the will were entitled to the absolute interest in the shares accruing to *Samuel Ovens* by survivorship, or to an interest *for life only*? Lord *Alvanley*, strongly remarking upon the impossibility of making any construction that might not, under circumstances, be contrary to the intention, expressed his opinion that the testator meant the children to take the surviving share, under the same terms and subject to the same restrictions and limitations as the original share: notwithstanding he admitted, if the surviving child were to die without leaving a child, there would, by that construction, be an intestacy: and his Lordship was of opinion, that he could not construe the words "survivors or survivor" to mean "others or other," so as to make them tenants in common with cross-remainders; and he decreed accordingly, that upon the death of *Jacob*, without issue, one-third part of his fourth of a third went to *John* for life, and one other third to *Samuel* for life, and the remaining third to *Hannah* for life: and upon the death of *John* leaving issue, his original share, together with the third share which devolved upon him for life upon the death of *Jacob*, belonged to *Jane Short* his only child; and upon the death of *Hannah Coe* without issue, her share, together with the third which accrued to her upon *Jacob's* death,

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belonged to *Samuel* for life; and in case he should die leaving issue, that issue would be entitled, as well to his original share, as to the shares which survived to him; and on the event of his death without issue, they would belong to the next of kin of the testator.

In *French v. French* (q), the testator gave a legacy of 5,000*l.* stock to his sons in trust for his daughter *W.*, so as not to be subject to the debts, acts, or control of her husband; and he then gave a legacy to the same amount to his daughter *A.* “*in trust as aforesaid,*” for the use of herself and children. Sir *L. Shadwell*, V. C., held that the words “*in trust as aforesaid*” clearly meant that the income of the fund should be paid to *A.* for her separate use.

14. Balance of
account.

14. Of the construction of a bequest of *balance of an account current.*

In *Innes v. Mitchell* (r), *William Innes* bequeathed by codicil to the eldest son of his late nephew *Alexander Innes*, all the debt which should or might be owing to the testator by the late *J. Crawford*, of *Bellfield* estate, *Jamaica*, on the first day of *January*, 1794, whether by bond, mortgage or open account, to the sole use of his grand nephew, subject to certain payments to his two brothers. By another codicil, the testator, noticing the above bequest, gave all the debt which should be owing by the late *J. Crawford*, of *Bellfield* estate, at the first of *January*, 1794, which he thereby altered to the first of *January*, 1796, subject to the payments, &c. The testator died in *January*, 1795. On the suit instituted by the grand nephew, two points were made; 1st, that the plaintiff became entitled to the debt bequeathed to him upon the testator's death; 2ndly, that if the Court should be of opinion, that he was not entitled to the debt until the first of *January*, 1796, the executors had by undue management with *J. Crawford's* executor, who was the brother of one of them, diminished the debt of the first of *January*, 1796, in order to lessen the plaintiff's legacy in favour of the residuary legatees. The Master's report stated that the amount of the debt, according to the usual course of dealing, would have been 14,517*l.* 16*s.* 3*d.* besides judgments; and no part of a sum of 3,000*l.* which the executors carried to the credit of the debt upon the 31st of *December*, 1795, would have been so carried, had the testator lived to 1796. Sir *William Grant*, M. R., was of opinion,

(q) 11 Sim. 257.

(r) 6 Ves. 461.

that the words of the first codicil created no doubt as to the time at which the principal legatee should take his legacy: the period at which it was intended that he should take the debt, being evidently the first of *January*, 1794, which by the subsequent codicil was altered to the first of *January*, 1796: and that that was all that could be properly said to be a question of construction. His Honor decided, that the consignments made in the year 1795, were not to be considered as payments, but that the amount of the debt was to be taken, as it stood *August*, 1796, since which time no payments, exclusive of the consignments, had been made to the credit of the debt.

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Balance of ac-
count.

In the case of *Hill v. Mason (s)*, Lieutenant-Colonel *Hill* bequeathed to his wife, the plaintiff, whatever *balance* might be in the hands of Messrs. *Greenwood & Co.* his agents, or any other agents he might have at the time of his decease. He died in *Jamaica*, on the thirty-first of *August*, 1819; having on the fifth of that month written to Messrs. *Greenwood & Co.* desiring them to purchase in his name a sum of 550*l.* three *per cent. consols.* The letter reached them in *September*, and in the following *October*, before the news of his death arrived, they invested 878*l.* 2*s.* 6*d.* in the purchase of 550*l. consols.* Upon a bill to ascertain whether the plaintiff was entitled to this sum, Sir *Thomas Plumer*, M. R., held that she was; being of opinion, that unless the letter were treated as testamentary, which it did not appear to be, the sum in question must be considered as forming part of the balance in the hands of Messrs. *Greenwood* at the time of the testator's death; since, if the letter were a power, it was revoked by his death.

15. As to the construction of the words "*House I live in, and garden.*" 15. House I live in, and garden.

In *Doe v. Collins (t)*, by deed of assignment, *Merick* and *Piercy*, assigned to *William Clements*, a messuage and garden, then in the occupation of *Clements*, and also the four messuages in the occupation of other persons therein named; and also the garden plot and piece of ground before the house, and also all that the thirty-six feet of ground in length from east to west, and eighteen feet in breadth from north to south, whereon the wash-house formerly stood, and all those two stables, with the granaries over the same, in the occupation of persons therein named, for the residue of several terms of years. *Clements*, being thus

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possessed, bequeathed as follows: "To *Hannah Clements*, I give *the house I live in and garden*, and also the household goods, so long as she lives; and the house that Mrs. *Purshouse* lives in, not to be disposed of; to go to her children afterwards; and the four tenements below the house I live in." The testator was a master bargeman and boat builder, and inhabited the house in question. He let out the four tenements mentioned in the deed; but occupied the stable and granaries, and the gardens to the front and east side of the house: a paling inclosed the stable yard and other premises, except the coal-pen, which was on the other side of the road running near the house. The testator used the stables in the adjoining court yard for the horses employed in his trade; and the rooms over the stable for hay and straw lofts. The coal pen contained usually fifty chaldrons of coals, wherein were deposited the coals not sold out of his coal barges; and the testator put the coals for the use of his family, which he took out of the pen by two or three bushels at a time, into the wash-house adjoining the house. The testator had a yard for building boats, about three hundred yards from the house, and a timber yard about the same distance. The question was, whether the granaries, stables, coal-sheds and piece of ground, belonged to *Hannah Clements*, under the above bequest: it was contended that these premises did not fall under the description of house and garden, as expressed in the will, and that those parts only passed, which were used by the testator for domestic purposes: and a distinction was taken between the words "messuage" and "house," the latter importing the mere place of abode, though the former, without the words *cum pertinentiis*, would pass the garden and curtilage occupied therewith(u). But *Ashurst*, J. discountenanced the distinction, and was of opinion that the testator intended to give everything which was in his occupation, as proper and convenient for the occupation of his house: he thought the stables were appurtenant to the house, as within the ring-fence; and though the difficulty was greater in regard to the coal-shed, yet, as there was no proof that it was appurtenant to any other house, and as the testator kept coals therein for the use of his own house, he considered that the coal-shed passed with the house; and in this opinion, *Buller*, J. concurred.

(u) Cro. Eliz. 89.

16. Construction of the word *appurtenances*, as applied to a piece of plate, consisting of several parts.

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In *Hunt v. Berkley* (v), a testatrix bequeathed her silver tea kettle and lamp *with its appurtenances*, to the defendant, who claimed the silver canister, tea-pot, lamp, milk-pot, spoons, strainer and tongs. But Sir *Joseph Jekyll*, M. R., held, that, by this word “appurtenances,” nothing passed but the stand or frame that supported the tea-kettle.

Of words and phrases.

16. Appurtenances, as applied to a piece of plate.

17. Of the effect of the word *item* in bequests of personal estate. 17. Item.

The word *item*, which frequently occurs in testaments, is to be construed a conjunctive in the sense of “and” or “also,” so as to connect sentences. If therefore, a testator bequeath a legacy to *B.* payable out of a particular fund, or charged upon a particular estate; *item*, a legacy to *C.*; *C.*’s legacy as well as *B.*’s will be a charge upon the same property.

Thus in *Cheeseman v. Partridge* (w), *Thomas Cheeseman* bequeathed thus: “I give to the charity school of *Yeovill*, to be paid twelve months after my decease, the full and whole sum of 50*l.* *Item*, I give unto the Latin school, if any man is possessed of it, that teacheth boys, and is richly grounded in the Latin tongue, the sum of 5*l.* to be paid yearly for teaching and instructing three boys. *Item*, I give to the poor of *Yeovill* fifty shillings a year to be paid every *Easter* after my decease, out of my estate at *Homer*, to be paid by my executrix. *Item*, I give my wife *Sarah Cheeseman*, that estate in *Homer* in the parish of *Trent*, and also that at *Wandall* in the parish of *Mudford*, to her and heirs for ever;” and he made *Sarah* executrix. The fund intended for the schools was not sufficient, and the question was; whether the estate at *Homer* was liable to make up the deficiency; and Lord *Hardwicke*, C., observed, “*Item* ought to be construed a conjunctive in the sense of *and* or *also* (x), to connect the two sentences, and make the estate at *Homer* as much liable to one annuity as the other; for *item* has never been construed a disjunctive, but is only made use of to distinguish the clauses in the will; the cases of *Cole v. Rawlinson*, 1 Salk. 234. *Hopewell v. Acland*, ib. 239, are in point for this purpose.”

(v) Mosley, case 32; 1 Eq. Ca. ab. 201, pl. 13.

(w) 1 Atk. 436.

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(x) For the effect of the word “also,” see *Richards v. Baker*, 2 Atk. 321; *Doe v. Westley*, 4 B. & C. 667.

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phrases.

"Item."

The word was so construed in *Castledon v. Turner* (y), and *Horton v. Stafford* (z).

In the former case, the bequest was this: "I bequeath my lands to my wife *Alicia* during her life, and after her decease, I give the lands to *Margaret Denton* niece to my said wife. *Item*, I give the use of 500*l.* stock for and during *her* natural life, but after *her* decease, I give, &c." Lord *Hardwicke*, C., in deciding that the wife, and not the niece, was entitled to the 500*l.* for life, observed, that he was not satisfied that the word *item* must be construed as independent of the preceding clause.

In the latter case the bequest was, "I give to my daughter *Priscilla Horton* 100*l.* a year in the long annuities. *Item*, I give Dr. *Stafford* (one of the plaintiffs) 50*l.* long annuities." It was insisted the testator intended only to give Dr. S. 50*l.* sterling, to be paid out of the long annuities; but Lord *Hardwicke* decided, that the 50*l.* legacy was to be transferred as annuities (a).

In *Oldman v. Slater* (b), the bequest was, "*Item*, I give to my wife 1,200*l.* a year during her life, and also my furniture and house, and after her decease to S. S. and his heirs, Sir *L. Shadwell*, V. C., held that S. S. was entitled to the fund for payment of the annuity as well as the house and furniture.

18. Of funds
"assigned or
transferred,"
at a given
period.

18. Of the effect of the words "assigned or transferred," with reference to a fund transferable at a given period.

In the case of *Hooper v. Goodwin* (c), the testatrix bequeathed, after the death of certain annuitants, a sum set apart by the Court of Chancery for payment of them, or such part of it as should not, by reason of their deaths, have been *assigned* or *transferred*. Upon the death of one of the annuitants, an order was made by the Court to transfer a portion of the fund to the testatrix, who died before the transfer was made: and it was held by Sir *T. Plumer*, M. R., that the sum which had been ordered to be transferred did not pass by the above bequest: but must be considered as having been "assigned" within the meaning of the will.

(y) 3 Atk. 256.

(z) 1 Bro. C. C. 482.

(a) For cases of real estate, see 1 Roll. Abr. 844; 1 Mod. 100; Cro. Car. 368; Vaugh. 262; see also *Doe v. Westley*, 4 B. & C. 669. For the effect of the word "*further*," in a

devise of real estate, see *Doe v. Turner*, 2 Dow. & Ryl. 399.

(b) 3 Sim. 84.

(c) 1 Jacob, R. 375; see *Collins v. Macpherson*, 2 Sim. 87, as to the construction of the words 'payable or divisible.'

19. Of the effect of a bequest of sums due from *G. B.* to the testatrix at the time of her death.

Construction of bequests generally.

In the case of *Collins v. Doyle* (*d*), the testatrix being entitled to a distributive share of the assets of an intestate to whom, at her death, no administration had been taken out, bequeathed "all such sums of money as should be owing to her at the time of her decease from *G. B.*" *G. B.* was also indebted to the estate of the intestate: and it was held by Lord *Gifford*, M. R., that the bequest did not carry her beneficial interest in a sum of money, which was then due from *G. B.* to the intestate's estate.

Of words and phrases.

19. Of bequest of sum due at testator's death.

20. Of the effect of a bequest subject to the payment of certain debts.

20. Of a bequest subject to payment of certain debts.

In *Stanton v. Knight* (*e*), a testator bequeathed a share of his residuary estate to a legatee, declaring that it should be liable to and answerable for the whole amount of all sums due to the testator from the legatee's father. The legatee insisted, that as one of those debts was usurious, and not recoverable at law, the amount shall not be deducted from his share; but Sir *Anthony Hart*, V. C., decided otherwise, being of opinion that the testator considered the sum in question a debt, and never contemplated that any objection would be made to it on the ground of usury.

In *Walker v. Lodge* (*f*), the real and personal estate of *Thomas Walker* was insufficient to pay his debts, and *John Walker*, the father of *Thomas Walker*, after the death of his son, by a codicil directed his trustees and executors to pay the debts of his son *Thomas*. Sir *John Leach*, M. R., held that the testator intended only such of his son's debts as, after the due application of the son's estate, should remain unsatisfied.

21. Of the effect of a residuary bequest of personal estate, upon trust funds impressed with the character of real estate.

21. Effect of a residuary bequest of personal estate upon trust funds impressed with the character of real estate.

In *Hougham v. Sandys* (*g*), it was held by Sir *Lancelot Shadwell*, V. C., that the residuary bequest of all the testatrix's ready money and securities for money in the public stocks or funds, debts due to her, and all other the residue of her personal estate whatsoever of which she had power to dispose, whether vested in her name or in the names of trustees, did not include trust monies in trustees' names produced by sale of settled estates, and impressed

(*d*) 1 Russ. 135.

(*e*) 1 Sim. 482.

(*f*) 3 Russ. 459.

(*g*) 2 Sim. 95, 109, 152.

Construction of bequests generally.

Of words and phrases.

22. Of bequest of residue between three, deducting out of share of one a debt from him to testatrix.

with the trusts of those estates; the general words of the residuary bequest not being sufficiently expressive of an intention to convert those funds, so impressed with the character of real, into personal estate, and then to pass them as such.

22. Of the effect of a bequest of residue between three, deducting out of the share of one a debt due from him to testatrix.

In *Murray v. Samson* (h), testatrix directed the residue of her property to be divided into three equal shares, giving one to the children of A., another to the children of B., and the remaining third to the children of C., "subtracting from their share the 2,000*l.* their father C. owes me." Sir L. Shadwell, V. C., held that the 2,000*l.* was to be considered part of the residue which was to be divided into thirds, and that the 2,000*l.* was to be taken into calculation as part of the share of the children of C.

23. Of a residuary bequest not an execution of a power of appointment.

23. A residuary bequest in general terms not an execution of a power.

In *Lempriere v. Valpy* (i), a married woman having power of appointment over certain funds by will, executed in conformity with the power, but not referring to it, gave to her husband all her property which she might die possessed of, or have in reversion or in expectation. Sir L. Shadwell, V. C., decided that this was not an execution of the power.

24. Of the words "the principal to devolve eventually to my residuary legatees."

24. Of the effect of the words "the principal to devolve eventually to my residuary legatees."

In *Arnold v. Arnold* (j), the testator desired that A. B. and C. might each enjoy, during life, the interest of 800*l.*, the principal to devolve eventually to his residuary legatees. The residue he directed should be divided into three equal parts, one part to each of his two brothers, and a sister, adding, "in case my said brothers and sister should not survive me, or have legal issue living at my death, then his, her, or their shares to devolve in equal proportions to the survivors, as well as the shares that may have been devised to such their issue." The testator's estate was not sufficient to pay the legacies in full; and a sum had been apportioned to answer B.'s life interest in the legacy of 800*l.* Upon his death

(h) 3 Sim. 536.

(i) 5 Sim. 108; see also *Lovell v. Knight*, 3 Ib. 275; see also Sir Edward Sugden's discussion of the

cases on this head, 1 Vol. Powers. 369; Ed. 7, and *Buxton v. Buxton*, 1 Keen, 753; see 1 Vict. c. 26, s. 27.

(j) 2 M. & K. 374.

the question was, whether the sum so appropriated should belong to the residuary legatees in their individual character, or whether it formed part of the residue: for, if the latter, it would be applicable towards supplying the deficiency of the annuities of the surviving annuitants. Sir *C. Pepys*, M. R., decided that the sum in question formed part of the residue, and that the persons, whoever they might be, who took the residue, should take this sum as part of his general estate.

Construction of bequests generally.

Of words and phrases.

25. Of the meaning of the word "fortune" in reference to various funds mentioned in the will.

25. Of the word "fortune" in reference to various funds.

In *Whyte v. Kearney* (*k*), by the marriage settlement of the testatrix in 1803, 4,000*l.* was settled (subject to a power of appointment which was never exercised) upon the children of the marriage equally: by the same settlement her real estates were charged with the sum of 8,000*l.* upon trust for the children of the marriage, in such shares as she should appoint. By her will, she appointed 100*l.* to the eldest son of the marriage, *John Robert Whyte*, and the remaining 7,900*l.* to the other children, to vest in sons at twenty-one, in daughters at that age or marriage. By virtue of a power of appointment over estates in the settlement, she directed a further sum to be raised to make the portions which her children by that marriage would take in the sum of 8,000*l.*, amount to 5,000*l.* a piece; subject to these charges she settled the estate upon *John Robert Whyte* for life in strict settlement, with remainders over. The testatrix by her will, in exercise of her power of appointing the residuary estate of *Jane Coghill*, given to her by her will, appointed small legacies to all her children except *John Robert Whyte*, to whom she appointed the residue of the property in case he attained twenty-one; if he died under age, to her other sons by the second marriage, and if no such son attained twenty-one, then to such of her daughters by such second marriage as should attain that age. By a codicil in 1809, the testatrix (stating that she was then enceinte), by virtue of all her powers, &c., directed that the same *fortune* should be given to such child or children of which she might be delivered, as was given by her will to each of her daughters, and to be paid in such manner and form as in her will mentioned concerning *the fortunes* thereby given to them: and she further directed, that in case no son by her second marriage should attain twenty-one, or be married previously, that thereupon each of her daughters present

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and future should be entitled to receive for her *fortune* the sum of 10,000*l.*, to be paid in manner mentioned in her marriage settlement or in her will, respecting the *fortune* of such daughters. The testatrix, after the date of the codicil, had two children. She died in 1811, leaving her son, *John Robert Whyte*, and three daughters. The son and one of the daughters died subsequently infants. One of the two surviving daughters, *Jane Anne*, attained twenty-one; the other, *Mary Ann*, was an infant when the bill was filed by the daughters. The bill prayed that it might be declared that *Jane Anne*, on attaining twenty-one, became absolutely, and that *Mary Ann* was presumptively entitled each to a fortune of 10,000*l.* to be raised out of the property comprised in the settlement of 1803, exclusive of the interests which they took in the residuary estate of *Jane Coghill*, and in the stock purchased with the 4,000*l.*; and Lord *Lyndhurst*, C., decided that they were, being of opinion that the testatrix, when speaking of the "fortune" of her daughters, only referred to what they would be entitled to receive under the dispositions made by her own will, and not what they would receive from any other quarter.

26. Of a be-
quest of monies
arising from
sale of real
estate.

26. Of a bequest of monies arising from the sale of real estates. In *The Earl of Newburgh v. Eyre* (1), the testator directed all his messuages, lands, and hereditaments in the county of *Leicester* (except a specified portion), to trustees to sell, and also his books and live and dead farming stock there, and to apply the monies arising therefrom upon the trusts after mentioned: in a subsequent part of the will the testator, directing the application of the fund, speaks of it as "the monies to arise from the sale of my *Leicestershire* estates;" and Sir *John Leach*, M. R., held that these words included the monies arising from the sale of the books and stock, as well as from the sale of the real estate.

27 "Begotten"
and "to be
begotten."

27. Of the construction of the words "begotten" and "to be begotten."

It may be convenient in this place to notice the construction of the words "begotten" and "to be begotten." Lord *Coke*, in his commentary upon the word begotten, in the 14th section of *Littleton* (m), speaking of limitations of estates tail, observes, where the word of *Littleton* is engendered or begotten, *procreatis*, yet if the word be *procreandis et quos procreaverit*, the estate tail is good; and

(1) 4 Russ. 454; see also *Byam v. Munton*, 1 Russ. & Myl. 503.

(m) 20 b

as *procreatis* shall extend to the issues begotten afterwards, so *procreandis* shall extend to the issues begotten before. This rule has been recognised and adopted in early and in recent cases, in the construction of wills as well as deeds, and in dispositions of personalty as well as in devises of real estate.

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phrases.

In *Cook v. Cook* (*n*), the question arose upon a devise to the issue of *J. S.*, who had then a daughter living, and afterwards a son was born. Lord Keeper *Cowper* observed, although the devise is to the issue "begotten," that makes no difference: the words begotten and to be begotten are the same, as well upon construction of wills as settlements, and take in all the issue after begotten.

In *Hewet v. Ireland* (*o*). Husband and wife having issue one daughter, about ten years of age, by settlement made a provision for securing 600*l.* in trust for the wife for life, and after her death, upon trust for such daughter or daughters, "*as shall be begotten*" by the husband on the wife: there was no daughter born afterwards. Lord Chancellor *Parker* decided that the daughter was entitled.

Again, in *Doe v. Hallett* (*p*), the devise was to the use of *B.* the only surviving son of *A.* for life, and to his first and other sons in strict settlement: remainder to the first, second, and all and every other son and sons of *A.* "*lawfully to be begotten*" in tail male. *A.* had besides *B.* a second son *C.*, nine years of age at the date of the will. *B.* died unmarried and without issue. The Court of King's Bench decided that *C.* was entitled. Lord *Ellenborough* alluded to the mistaken description of *B.* as the only surviving son, when in fact there was another, but his judgment does not appear to have been influenced by this circumstance.

Suppose a testator having four daughters, *A. B. C.* and *D.*, gives a trust fund equally amongst his daughters, *B. C.* and *D.*, and "all and every other his daughter or daughters lawfully to be begotten," and there is nothing more to be collected from the language of the will, to shew that the testator intended to exclude his daughter *A.* Would *A.* under the above construction of the words "*to be begotten*," be entitled equally with her sisters? This point has occurred in practice under a corresponding devise of real estate to the daughters as tenants in common in tail. The

(*n*) 2 Vern. 546; 10 Sim. 317.

(*o*) 1 P. Wms. 426; 1b. 231; see also cases temp. Talbot, 32; 3 Leon, 87.

(*p*) 1 Mau. & Selw. 124; see *Early v. Benbow*, 2 Coll. (C.), 342; Sir *K. Bruce's* comments on the two preceding cases; 1b. 351, &c.

Construction of bequests generally.

Of words and phrases.

Editor's opinion is, that without the aid of other expressions in the will, the above rule of construction would prevail.

In support of the opinion that it was an unintentional omission, it may be urged that if the testator intended to exclude *A.*, it is very improbable he should leave it to doubtful construction, and not have expressly excepted her out of the general disposition in favour of the other daughters, thus to all and every my daughters, &c., (except *A.*) On the other hand it must be admitted that the maxim, *expressio unius est exclusio ulterius* is in support of a different construction.

28. Legacy "to my beloved wife," she having died, and testator married again.

28. Effect of legacy "to my beloved wife," where the testator's wife, who was living at the date of the will, died, and he married again, leaving his second wife surviving.

In *Garratt v. Niblock* (*q*), it was decided that a bequest "to my beloved wife," not naming her, applied only to the wife living at the date of the will, and not to an after taken wife.

It may be observed that such a question could not arise under the 1 Vict. c. 26, marriage being, by the eighteenth section, a revocation of a prior will.

29. Of the words "last mentioned children," in reference to three previous classes.

29. Effect of the words "*last mentioned*" children, in reference to three classes previously enumerated.

In *Walker v. Moore* (*r*), a testator bequeathed his residuary property amongst his five grandchildren, *A. B. C. D.* and *E.*, his grandson, *W. M.*'s two children *F.* and *G.*, and his niece, *R. W.*'s two children *H.* and *K.*; and in case any of the said *last mentioned children shall* die under twenty-one and leave no issue, then the survivors to have the *share or shares of him, her, or them* so dying, equally. *F.* one of *W. M.*'s children, died under twenty-one without issue, and the question was, whether his ninth was divisible, and amongst what survivors; it was submitted that it was not divisible, but if so, that the five first mentioned legatees could not participate. Lord *Langdale*, M. R., was of opinion that the eight survivors were entitled, the words "*last mentioned*," referring to all the individuals enumerated in the preceding residuary disposition of his property.

30. Of money at the Bankers.

30. The bequest of money at the bankers, upon the whole will, constituting a general bequest of the residue of personalty.

In *Boys v. Morgan* (*s*), the testator concluded his will thus: "I guess there will be found sufficient in my banker's hands to

(*q*) 1 Russ. & M. 629.

(*r*) 1 Beav. 607.

(*s*) 9 Sim. 289, aff.; 3 M. & Cr. 661.

discharge all my debts, which I desire *A.* to do, and keep the residue for her own use." Sir *L. Shadwell*, V. C., held, that the words amounted to a bequest of the general residue of the testator's personal estate, which judgment was afterwards affirmed by Lord *Cottenham*, C.

Construction of bequests generally.

Of words and phrases.

31. Construction of the words "*to be settled*" upon the legatee.

In *Young v. Mackintosh* (*t*), the bequest was of 2,000*l.* to the testator's daughter, *Jane*, "to be settled upon her when she married, or to be paid to her on her attaining the age of twenty-one: should she die not leaving issue, the legacy to fall into the residue." The legatee married after the testator's death, but before she attained twenty-one: there were no issue when the bill was filed. Sir *L. Shadwell*, V. C., was of opinion that the meaning of the testator was, that if the legatee married before twenty-one, the legacy should be settled: and his Honor directed the fund to be settled upon the legatee for her separate use for life, and after her death to her children surviving her, as she should appoint; in default of appointment to the children equally to vest in sons at twenty-one, in daughters at that age or marriage: if all the children surviving her should die without attaining a vested interest, then as she should by will appoint; and in default to her next of kin, as if she had died intestate and unmarried: but if no child should survive her, the legacy to form part of the testator's residuary estate.

31. Of the words "to be settled."

32. For the construction of the word "all," see the case of *Mohun v. Mohun*, stated in a former page (*u*).

32. "All."

33. For the construction of the word "now," see the case of *Crossley v. Clare*, also stated in a former page (*v*).

33. "Now"

34. The construction of the expression "*from*" a given day.

In *Gorst v. Lowndes* (*w*), the testator directed the income of his property to be accumulated for the term of twenty-one years *from* his death, the testator died on the 5th of *January*, 1820. Sir *L. Shadwell*, V. C., held, that in the computation of the term, the day of the death was to be excluded, and consequently that the dividends on the stock which became due on the 5th of *January*, 1841, were subject to the trust for accumulation.

34. "From" a given day.

(*t*) 13 Sim. 445.

(*u*) P. 1437.

(*v*) P. 136, and see *James v.*

Richardson, T. Jones, 99; Bla. R. 1012.

(*w*) 11 Sim. 435.

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Of words and phrases.

35. "Joint and joint natural lives."

35. On the construction of the words, *joint* and *joint natural lives*, see *Townley v. Bolton* (x), and *Smith v. Oakes* (y), stated in a former page (z).

In *Hatton v. Finch* (a), a bequest to A. and B. of the sum of 25*l.* *per annum* each for the term of their 'natural lives,' or the life of the longest liver of them, for their or her own absolute use and benefit. Lord *Langdale*, M. R., held, that on the death of A., her annuity survived to B. for life.

36. "Holy orders."

36. On the construction of the expression, 'holy orders.'

In the case of the *Attorney General v. Glasgow College* (b), Sir *K. Bruce*, V. C., held, that in the will of a member of the established Church of *England*, or of the episcopal established Church of *Scotland*, made in 1677, and republished in 1679, in which year the testator died, the expression 'holy orders' meant holy orders by episcopal ordination.

37. "To be disposed of in a due course of administration."

37. Of the effect of the words, "to be disposed of in a due course of administration."

In *Scott v. Moore* (c), the bequest was of 19,000*l.* consols to trustees, in trust for E. B. for life, and after her death for her children; and, in case she should die without leaving a child, he directed that the trust fund "should be considered as part of his personal estate, and be disposed of in a due course of administration;" and he gave the residue of his effects to E. B., her executors and administrators for her and their own use and benefit, she and they paying thereout all such debts and sums of money as should be justly owing from him at his decease, with the expenses of his funeral, the charges of proving and establishing his will, and other incidental expenses; and he appointed E. B. his executrix. E. B. survived the testator, and died without leaving a child. The fund was claimed by the testator's widow and next of kin, and the representatives of E. B. Sir *L. Shadwell*, V. C., held, that it was not undisposed of, but formed part of the residue of the testator's estate, and belonged, as such, to E. B.'s estate: his Honor interpreted the language of the bequest to mean, that the fund, in the event which had happened, was to be applied in payment of the debts and sums of money justly owing from the testator at his decease, the expenses of his funeral, and the charges of proving and establish-

(x) 1 Myl. & K. 148.

(y) 14 Sim. 122.

(z) P. 1448.

(a) 4 Beav. 186.

(b) 2 Coll. 665.

(c) 14 Sim. 35.

ing his will and other incidental expenses, and subject to that liability, it would go to the residuary legatee. In the conclusion of his judgment, his Honor expressed his opinion, that the case of *Martin v. Hooper* (*d*) was not rightly decided.

Construction of bequests generally.

Of words and phrases.

38. When words, strictly, importing a future sense, upon the context and to effectuate the intention, have been construed to refer to the past.

38. Where words importing the future, construed to refer to the past.

In *Manning v. Chambers* (*e*), in a settlement there was a trust in favour of *A.* until he shall become bankrupt, or upon his death or becoming bankrupt, then over. *A.* was a bankrupt seven days before the execution of the deed of settlement, and at its execution an uncertificated bankrupt: Sir *K. Bruce*, V. C., held the trust over took effect: his Honor in the course of the argument referred to *Tytherleigh v. Harbin* (*f*), *Giles v. Giles* (*g*), *Smith v. Smith* (*h*), and *Jarvis v. Pond* (*i*), as illustrating the above rule of construction.

IV. *Fourthly*, we proceed to consider the effect of a recital.

4. The effect of recital.

A mere recital without more, will not, it should seem, amount to a gift, or a demonstration to give (*j*).

Thus, if a testator says, out of the 100*l.* which I bequeath to *A.* I give *B.* 50*l.*; this is a good gift to *B.*, but *A.* will take nothing: for, it is added, words of diminution shall never be construed to give a legacy by implication (*k*).

The cases of *Frederick v. Hall* (*l*), *Upton v. Lord Ferrers* (*m*), and *Constantine v. Constantine* (*n*), before stated, are here referred to, as illustrative of the preceding proposition.

Neither will a mistaken recital of a previous legacy by will or codicil revoke or modify that legacy (*o*); nor will a mistaken or inaccurate recital, or description of a legacy given by the will, prevent its revocation by a codicil, the intention to revoke being otherwise apparent (*p*).

Neither will a misapprehension expressed by the testator, that

(*d*) 4 Bro. C. C. 207.

(*e*) 11 Jur. 466.

(*f*) 6 Sim. 329.

(*g*) 8 Ib. 360.

(*h*) Ib. 353.

(*i*) 9 Ib. 549.

(*j*) 18 Ves 41, per Lord Eldon.

(*k*) Bac. Ab. Legacy, (A.), Godolph. 282.

(*l*) 1 Ves. jun. 396; *supra*, 1470.

(*m*) 5 Ves. 801; *supra*, ib.

(*n*) 6 Ves. 100; *supra*, 1452; see also *Holder v. Holder*, 8 Vin. Ab. 269; *Shelley v. Bryer*, ac. 207, *supra*, 144.

(*o*) *Vaughan v. Foakes*, 1 Keen, 58; *Gordon v. Hoffman*, 7 Sim. 29; *Barry v Crundall*, id. 430.

(*p*) *Pilcher v. Hole*, 7 Sim. 208.

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a party takes an interest in the property devised or bequeathed, independently of the will, amount to a gift by implication of the amount of that interest; as such mistaken recital does not furnish sufficient evidence of an intention to give.

Thus, in *Adams v. Adams* (q), the testator devised and bequeathed real and personal estate upon trust for his children, subject to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues, and profits, after deducting the dower and thirds of his wife to the maintenance of the children: it appeared that the widow was not entitled to dower. Sir *James Wigram*, V. C., held the widow not entitled to any estate by implication. In the course of his judgment his Honor observed, a devise of property, subject to a certain debt or charge, which the testator thought that a stranger had upon it, when in fact there was no such debt or charge, would afford no necessary implication that the testator intended a gift to a stranger, of the amount of the assumed debt; and he thought in principle, there was nothing to distinguish the two cases.

But where recital manifests an intention to make a present bequest, and the words of actual bequest are omitted by mistake, the words will be supplied; and the recital will amount to an implied bequest, a subject before considered in the present chapter.

Thus, in *Bibin v. Walker* (r), where the testator having two nieces, *Elizabeth* and *Athaliah*, bequeathed one moiety of his leasehold estate to his niece, *Elizabeth*, and in case of her death under twenty-one, then to a legatee over. The testator added, in case his niece, *Athaliah*, should die without any issue, &c., his will was, that the said moiety or half part of his said leasehold, &c., before given to his said niece, *Athaliah*, should go to his niece, *Elizabeth*, &c. Sir *Thomas Sewell*, M. R., was clearly of opinion, that *Athaliah* was entitled to the other moiety; there could be no doubt of the intention; and the words of gift being omitted by mistake, the Court would supply them (s).

But, in *Jordan v. Fortescue* (t), a misrecital of the amount given by a previous will and codicil, was considered by Lord *Langdale*, M. R., to be a sufficient indication of intention to give that sum. The testator, by will, gave *A.* 500*l.*, by the first codicil, 500*l.* in addition, and by the third codicil, 500*l.* "in addition to the 1,500*l.* already given him." His Lordship held *A.* entitled to 2,000*l.*

(q) 1 Hare, 537.

(r) Amb. 661; see also *Adams v. Adams*, ubi supra.

(s) See also *Smith v. Fitzgerald*, 3 Ves. & Bea. 7, 8; per Sir *William Grant*.

(t) 11 Jur. 549.

CHAPTER XXII.

Of the limitation of Chattels.

THE early doctrine respecting the disposition by will of chattels real and other personal estate, appears to have been, that a bequest of them for life amounted to so absolute a gift, as to invalidate any further limitation after the first legatee's death (*a*). It was, however, discovered, that such a construction generally defeated the intention of testators, and the old rule was gradually relaxed. The first change of the law in favour of such bequests was made by raising a distinction between the gift of the *thing* itself, and a bequest of the *use* only for life, the law allowing a validity to the latter disposition, which it denied to the former (*b*). In process of time, as personal estate increased in value and estimation, this fine-spun distinction gave way to a more liberal and rational construction, and it is now perfectly settled, that, whether the gift be of the *subject itself* for life, or only of the *use*, a limitation over to a subsequent legatee, after the decease of the first taker, will be supported (*c*); so that, although the law does not allow of limitations of personal estate by way of remainder, in the proper sense of that term, yet by executory bequest or trust, interests, in the nature of remainders, may be created by will or deed.

As none but estates of inheritance are within the statute *De donis* (*d*), chattels real and other personal estate cannot be *entailed*; but by executory devise, or through the medium of trusts, they may be limited, so as in a great measure to answer the purposes of entail; and, indeed, are susceptible of modification so as to be confined in a particular course of devolution, and, except for the purposes of accumulation, rendered unalienable for any number of lives in being, and twenty-one years after, with a further period allowed for gestation: at the end of which period the personalty will vest absolutely in the person taking under the limitation, trust, or executory bequest. All the foregoing modes

(*a*) 1 Roll. Abr. 610; Bro. Abr. 235, pl. 13. *Cotton v. Heath*, Roll. Abr. 612; Anon. 2 Freem. 206; *Hyde v. Parratt*, 1 P. Wms. 1; *Catchmay v.*

(*b*) Plowd. 521; Cro. Car. 346.

(*c*) *Matthew Manning's case*, 8 Rep. 95; *Lampet's case*, 10 Rep. 46; *Nicholls*, Ib. 5. notes.

(*d*) 13 Ed. 1, c. 1.

of disposition, when occurring in a will, are technically speaking, executory bequests.

With these preliminary observations, we shall present the reader with the leading distinctions in the construction and properties of these dispositions of chattels real and other personal estate, with a general reference to the cases proving and illustrating the principles adduced; the cases themselves being too numerous to admit of a detailed consideration according to the usual method of the present work—a method, indeed, in the subject immediately under consideration, unnecessary.

Notwithstanding, as we have before observed, all the foregoing varieties of testamentary disposition of chattels real and other personalty are, strictly speaking, executory bequests; we shall for the sake of more convenient analysis and easy reference, class the cases under the following arrangement.

SECT. I. Bequests of chattels real and other personalty, which, in devises of estates of inheritance, would give an *express* estate tail to the first legatee.

Exception where words are superadded to the preceding words of limitation.

SECT. II. Bequests of chattels real, &c., which in devises of estates of inheritance, would give an *implied* estate tail to the first legatee, and herein of the 1 Vict. c. 26, s. 29.

SECT. III. Bequests of chattels real, &c., which give an estate for life to the first legatee, and an absolute estate to his issue as purchasers.

SECT. IV. Of Bequests *executory* or *inchoate*, as distinguished from bequests *choate* and *complete* in themselves.

SECT. V. Of bequests of chattels real, &c., which in devises of estates of inheritance would, strictly speaking, be executory devises.

I.—*Bequests to take effect after a life or lives in being, and twenty-one afterwards.*

II.—*Where the general import of the words “after failure of issue” has been restrained.*

- 1.—Where the gift is to two, with a gift to the survivor after a failure of issue of the other.
- 2.—When the “failure of issue” confined to the death of the person, upon the failure of whose issue the limitation over is to take effect.
- 3.—Where the dying without issue is confined to the life of the legatee over.
- 4.—Where the words “leaving,” &c. have restricted the general import of the expression “without issue.”
- 5.—Where the word “having” not synonymous with “leaving.”
- 6.—Where “dying without issue” confined by preceding words of narrower signification.
- 7.—Where restrained when coupled with a power of appointment.

SECT. VI. Bequests of personalty upon trusts for accumulation.

- 1.—Where void for the excess.
- 2.—Where void in toto.

SECT. I.—Bequests of chattels real and other personalty, which, in devises of estates of inheritance, would give an *express* estate tail to the first legatee.

Bequests of
chattels.

Thus, for example, where a testator bequeaths personal estate to *A.* and the heirs of his body (*e*), or to the heirs male of his body (*f*), or to *A.* for life, and after his decease to the heirs of

In words im-
porting an ex-
press estate tail.

(*e*) *Attorney General v. Gill*, 2 P. Wms. 368; *Attorney General v. Hird*, 1 Bro. C. C. 170; 4 Mad. 361. 1 P. Wms. 289; *Pelham v. Gregory*, 5 Bro. P. C. 432, 2d. ed. Vol. III, p. 204; *Montague v. Beaulieu*, 6 Bro. P. C. 255, 2d. ed. Vol. III., p. 297; (*f*) *Leventhorpe v. Ashbie*, 1 Roll. Abr. 611, pl. 1. *S. C. D'Anver's Ab.* Vol. II. p. 521, pl. 1; *Seale v. Seale*, *Fordyce v. Ford*, 2 Ves. jun. 536; *Ware v. Polhill*, 11 Ves. 257.

Bequests of
chattels.

In words im-
porting an ex-
press estate tail.

his body (*g*), or to the heirs male of his body (*h*); or, again, to *A.* and his issue (*i*), or to the children of *A.* and their issue, share and share alike (*j*), to take *per stirpes* (*k*), or to the children of *A.* and their children after them (*l*), or to his issue male (*m*), or to his issue male and female (*n*), or to *A.* and his children (*o*); as all the foregoing examples would in devises of real estate of inheritance give an *express* estate tail, so a bequest of personalty in the above words would give an absolute interest to the legatee, as that species of property is incapable of being entailed, or of being the subject of common recovery; and consequently any subsequent bequest over on the failure of heirs or issue of the first taker would be of no effect, being too remote, as will appear by the cases referred to (*p*); and it will make no difference in regard to the construction, whether the interest or profits only are given to the first taker, and the principal to his heirs or heirs of his body, &c. (*q*).

Thus in *Glover v. Strothoff* (*r*), *Mary Burgess* directed her trustees to lay out at interest upon real or personal security, 4,000*L* sterling, and pay the *interest thereof only* to *Richard Glover* for life, and pay the principal to the *heirs* to be lawfully procreate of his body, with a declaration that the interest should

(*g*) *Richards v. Bergarvenny*, 2 Vern. 324; *Robinson v. Fitzherbert*, 2 Bro. C. C. 127; *Butterfield v. Butterfield*, 1 Ves. sen. 133, 154; *Garth v. Baldwin*, 2 Ves. sen. 645; *Bodens v. Lord Galway*, 2 Eden, 297; *Elton v. Eason*, 19 Ves. 73; *Browncher v. Bagot*, 19 Ves. 574; S. C. 1 Mer. 271; *Kinch v. Ward*, 2 Sim. & Stu. 409; *Earl Verulam v. Bathurst*, 13 Sim. 374.

(*h*) *Chatham v. Tothill*, 6 Bro. P. C. 450, 2d. ed. Vol. VII., p. 453; *Britton v. Twining*, 3 Meriv. 176.

(*i*) *Salkeld v. Vernon*, 1 Eden. 95; *Lyon v. Mitchell*, 1 Mad. 467; *Gibbs v. Taite*, 8 Sim. 132; *Attorney General v. Bright*, 2 Keen, 57; *Martin v. Swannel*, 2 Beav. 249; *Hedges v. Harper*, 10 Jur. 578.

(*j*) *Butter v. Ommaney*, 4 Russ. 70.

(*k*) *Pearson v. Stephen*, 2 Dow. & Cl. 328; *Dick v. Lacey*, 8 Beav. 214.

(*l*) *Snowball v. Proctor*, 2 Yo. & Coll. (C.), 478.

(*m*) *Donn v. Penny*, 19 Ves. 545; S. C. 1 Mer. 20.

(*n*) *Tate v. Clarke*, 1 Beav. 104.

(*o*) *Gawler v. Cadby*, 1 Jac. 347, per Sir Thomas Plumer, M. R.; *Taniere v. Pearkes*, 2 Sim. & Stu. 383; see *Newman v. Nightingale*, 1 Cox, 341; *Scott v. Scott*, 9 Jur. 589; *Stokes v. Heron*, 12 Cl. & F. 161, per Lord Brougham, ib. 178, &c.

(*p*) See Fearne's Ex. Dev. ch. 3, s. 2, 10. ed. 1844, p. 459, 462; *Cuthbert v. Purrier*, 1 Jacob, R. 415; *Bull v. Pritchard*, 1 Russ. 213; *Monkhouse v. Monkhouse*, 3 Sim. 119.

(*q*) *Butterfield v. Butterfield*, 1 Ves. sen. 133, 154; *Robinson v. Fitzherbert*, 2 Bro. C. C. 127; *Earl of Chatham v. Tothill*, 6 Bro. P. C. Vol. VII. p. 453.

(*r*) 2 Bro. C. C. 34, 37.

not be affectable by the debts or deeds of *R. Glover*; and in the event of his death without lawful issue of his body, or of his selling, assigning, or otherwise disposing of all or any part of the above interest, she directed that the 4,000*l.* should belong to *W.* One of the questions was, whether the bequest over to *W.* was void, as too remote; and Lord *Thurlow* decreed that it was; observing, it was then too late to argue upon the distinction of principal and interest, or to insist upon circumstances of intent (*s*).

Bequests of chattels.

In words importing an express estate tail.

For those cases, wherein the word "*heirs*" is construed "*children*," the reader is referred to Chap. XI. sect. 3, of this work.

But an exception to the above rule has been made, where to words of limitation improperly applied to personal bequests, further words of limitation have been superadded, in which case, the first words of limitation have been converted to words of purchase.

Exception, where words are superadded to the words of limitation.

Thus where the bequests were to a legatee, and to the heirs of his body, their executors, administrators, and assigns; or to be equally divided among them, and the like; it has been inferred from the words grafted upon the limitation to the heirs of the body of the legatee, that the testator could not intend the heirs to inherit *qua* heirs in infinitum, but distributively as purchasers, so as to give the legatee an interest for life only, with remainder to his children, or heirs as tenants in common (*t*).

Accordingly, in *Law v. Davis*(*u*), before the Lords Commissioners in 1777, *A.* bequeathed to *B.* and his heirs male, equally to be divided between them, share and share alike. *B.* had four children; and though the limitation was not to him for life, yet the Court decreed, that the true construction was to give him the interest only, and the principal to be divided among his heirs male equally.

(*s*) See *Fearne's Executory Devises*, chap. 3, sect. 3, p. 462, 10th ed.

(*t*) In devises of real estate, however, the construction would, it should seem, be otherwise, and for a very important case in such limitations, the reader is referred to *Jesson v. Wright*, 2 Bligh, 1, the very able arguments and judgment in which are well deserving a careful perusal. The devise in that case was to *William* for life, and after his decease to

the heirs of his body, in such shares, &c. as he should appoint, and for want of such appointment, to the heirs of the body of *William*, share and share alike, as tenants in common; and if but one child the whole to such only child, and for want of such issue over. Held, that *William* took an estate tail; see also *Franklin v. Lay*, cited 2 Bligh, 59.

(*u*) Cited 1 Ves. jun. 145, and by Lord *Hardwicke*, Amb. 11. Fitz. 112.

Bequests of
chattels.

In words im-
porting an ex-
press estate tail.

Exception,
where words
superadded.

A similar decision was made in *Donne v. Merrefield* (v), where the bequest was of a term to the testator's brother *John* for life, then to such person as he should marry, for her jointure; and after her death, *to the heirs of the body of John*, and the *executors, administrators, and assigns of such heirs male*.

So in *Wilson v. Vansittart* (w), the bequest was to *John Wilson* and *to his heirs male, equally to be divided among them, share and share alike*.

So in *Hodgeson v. Bussey* (x), the trusts in a postnuptial *settlement* of the residue of a term of years, were for *Grace Bussey*, for life; after her decease, for her husband *Edward*; and after their decease, in trust for the heirs of the body of *Grace* by *Edward* begotten, their executors, administrators and assigns.

Again in *Hockley v. Mawbey* (y), the bequest was of freehold and leasehold to *Richard Russell*, and *his issue lawfully begotten or to be begotten, to be divided among them as he should think fit*.

Also in *Jacobs v. Amyatt* (yy), where the bequest was to *Lucy Cooke* for life; and after her decease, unto *the heirs of her body lawfully begotten, equally to be divided between them, share and share alike*.

In *Doe v. Lyde* (z), the bequest was of a term (after the death of *George Lyde* and *Margaret* his wife, to whom successive life estates were given), to the children of *George*, share and share alike: but if *George* should die without issue of his body, then to *Robert Lyde*, &c., and *Mary* his wife, in like manner. The limitation over was decided to be good, and that the words did not vest the term in *George* absolutely, as they were not to be construed as giving an estate tail, had the subject been real estate.

In the last case Mr. Justice *Buller* recognizes the rule laid down by Lord Chief Justice *Wilmot*, in *Keily v. Fowler* (a), where the words were, "heirs of the body:" and, quoting his words, thus: "the truth is, we are bound to an artificial and

(v) Cited in *Sabbarton v. Sabbarton*, For. 55.

(w) Amb. 562.

(x) 2 Atk. 89.

(y) 1 Ves. jun. 143, 149.

(yy) 4 Bro. C. C. 542; and see 13 Ves. 479; 1 Mad. 376. This decision is objected to by the author of the note to the case in Mr. Belt's edition of *Brown's Reports*; but it

should seem that that case falls within the class above considered, and is clearly distinguishable from the cases mentioned in the conclusion of that note; notwithstanding it is admitted that the distinction between express and implied estates tail cannot now be supported.

(z) 1 T. R. 593.

(a) 6 Bro. P. C. 309.

technical sense of those words, unless there is an apparent intention in the testator, of using them in their natural meaning;" adds, "and for that purpose, which is in favour of common sense, the most trifling circumstance is sufficient."

Bequests of chattels.

In words importing an express estate tail.

To the preceding cases, *Crawford v. Trotter* (b), may be added, where the bequest was "to Lady Scott and her heirs (say children);" and the Vice Chancellor decided that she was entitled for life only, with remainder to her children; the word "heirs" being used as synonymous with "children," importing they were to take after her death.

Exception, where words superadded.

So likewise a similar exception has been made, when, from the nature of the limitation to the heirs of the body, the words, if applied to freehold lands, would give an estate tail to *some* of the devisees only, and estates by *purchase* to the heirs of the bodies of the *others* of them, the Court has laid hold of this circumstance in personal bequests to infer from it, that the testator intended to make all the legatees purchasers.

So where estates tail by purchase are given to the heirs of the body of some of several devisees.

Thus, if the bequest were to *A.* for life, and after *A.*'s death to the heirs of *A.*'s body, and the heirs of the bodies of *B.* and *C.*, and *on failure of such heirs*, with remainder over: in such case, as the heirs of the bodies of *B.* and *C.* could take as purchasers only, for want of a prior interest in their parents, a similar interpretation would be put upon the limitation to the heirs of the body of *A.*; so that, upon the event of the death of *A.* *B.* and *C.* without leaving heirs of their bodies, the limitation or executory bequest over, would take effect.

This, in fact, was the case of *Withers v. Algood*, cited in *Bagshaw v. Spencer* (c), upon which Lord *Talbot* is said to have observed, the rule of law was not so strict as to control the intent (d).

In *Leonard Lovie's* case (e), *Coke*, C. J., took a distinction between a term in gross and one created *de novo*. He admitted, that if a term be devised to one and his heirs males of his body, his heirs shall not have it, but his executors; for a term, which is but a chattel, cannot be entailed, and such devisee may well alien the term to whom he pleases; but he took a distinction between the term subsisting at the date of the will, and a devise to *B.* and the *heirs of his body* for one thousand years, in which latter case he intimated an opinion, that the term would cease in favour of the testator's heir, on failure of the heirs of the body

(b) 4 Mad. 361.

(c) 1 Ves. sen. 149.

(d) Per Lord *Hardwicke*, C.

(e) 10 Rep. 87.

Bequests of
chattels.

In words im-
porting an es-
tate tail.

of *B.* This opinion, however does not appear to have been adopted; Lord Keeper *Finch*, in *Burgis v. Burgis* (*f*), and Lord *Nottingham*, in the Duke of *Norfolk's* case (*g*), having denied its authority.

SECT. II. Bequests of chattels real, &c. which, in devises of estates of inheritance, would give an *implied* estate tail to the first legatee.

Bequests of
chattels in
words import-
ing an estate
tail by implica-
tion.

Of bequests of personal estate, which in devises of estates of inheritance, would give estates tail by *implication* (*h*).

It is a settled rule of construction, proved by a numerous class of cases, but now only applicable to bequests in wills made before the year 1838, that where estates of inheritance are devised to *A.* and if he dies without heirs of his body, or without issue (general or special), to *B.*, *A.* takes an estate tail by necessary implication. The rule is the same in bequests of chattels real and other personal estate; for *A.* the legatee, being entitled by the *express* bequest for life only, and *B.* the legatee over, being entitled to nothing upon the single event of *A.*'s death, but upon that event coupled with the general failure of *A.*'s issue, if *A.* were not considered as taking immediately for himself and his issue, the interest, between his death and the event upon which *B.* could take, would be undisposed of; therefore, as the words are large enough, the Court implies an intention in the testator to transmit the legacy to *A.*'s issue; but as chattels cannot be entailed, the absolute interest in them *ex necessitate*, must vest in *B.* (*i*).

So where the devise of real estate was to *A.* for life, and in case he has issues, then that they should jointly inherit the same after his decease: and in a subsequent part of the will the testator gave the residue of his real and personal estate to *A.* for life, but in case *A.* "dies without issue," then over: it was held that *A.* took an estate tail in the real estate, and an absolute interest in the personalty (*j*).

So where the devise was to *A. B. C. &c.*, share and share alike for their lives, remainder to their respective children for

(*f*) 1 Mod. 115.

(*g*) Pollexf. 223; 3 Ch. Ca. 30.

(*h*) See Fearne's Ex. Dev. 10 ed. ch. 3, s. 9, p. 477.

(*i*) *Brooks v. Lord Lake*, 10 Jur. 485.

(*j*) *Ward v. Bevil*, 1 Yo. & J. 512; see also *Dunk v. Fenner*, 2 Russ. & M. 557; *Franks v. Price*, 3 Beav. 182; *Cape v. Walker*, 2 Mann. & G. 113.

their lives, so to be continued from issue to issue for life: it was held, that *A. B. C. &c.* took an estate tail in the real estate, and an absolute interest in the personalty (*j*).

Bequests of
chattels, &c.

In words im-
porting an es-
tate tail by
implication.

It will appear from the cases cited below (*k*), that attempts have been made to raise a distinction, in the above construction, in cases where the bequests would (if the subject were real estate of inheritance) give an *express* estate tail, and where they would only be construed to create an estate tail *by implication*; but the distinction is now exploded (*l*); and the cases cited abundantly prove the proposition, that where personal estate is bequeathed to *A.* generally, to *A.* for life, or to *A.* his executors, &c. (*m*), and if he die without heirs of his body (*n*), or without issue (*o*), the legatee will take an absolute interest, and the limitations over will be void.

But in bequests made since the year 1837, the 29th section of the first of 1 Vict. c. 26, has made a very material alteration in the rule of construction above discussed. By that section it is enacted, that in any devise or bequest of real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail, in such person, or issue,

(*j*) *Mortimer v. West*, 2 Sim. 274.

(*k*) *Atkinson v. Hutchinson*, 3 P. Wms. 258; *Daw v. Lord Chatham*, Fearne, 464, ed. 10; 6 Bro. P. C. 450, reported also, 1 Mad. as *Tothill v. Pitt*, 488; *Doe v. Lyde*, 1 T. R. 596.

(*l*) Per Lord Loughborough, *Chandless v. Price*, 3 Ves. 102.

(*m*) *Bigg v. Bensley*, 1 Bro. C. C. 187.

(*n*) *Boden v. Watson*, Amb. 398, 478; and see *Stafford v. Buckley*, 2 Ves. sen. 170.

(*o*) *Dingly v. Dingly*, 2 Freem. 41; *Burford v. Lee*, Ib. 210; Anon. Ib. 287; *Green v. Rod*, Fitz. 68;

Love v. Wyndham, 1 Levinz, 290;

Flanders v. Clarke, 1 Ves. sen. 9;

Stafford v. Buckley, 2 Ves. sen. 170;

Beauclerk v. Dormer, 2 Atk. 308;

and see *Trafford v. Bohem*, 3 Atk.

449; *Everest v. Gell*, 1 Ves. jun.

286; *Chandless v. Price*, 3 Ves. 99;

Barlow v. Salter, 17 Ves. 479; *Candy*

v. Campbell, 2 Cl. & Fin. 421; 8 Bli.

469; *Campbell v. Harding*, 2 Russ.

& M. 390; 8 Bli. 469; *Attorney Ge-*

neral v. Bright, 2 Keen, 57; see

Andree v. Ward, 1 Russ. 260; and

Green v. Ward, Ib. 262, where life

estate was not extended, by implica-
tion, to a *quasi* estate tail.

Bequests of
chattels, &c.

In words im-
porting an es-
tate tail by
implication.

or otherwise: Provided that the act shall not extend to cases where such words as aforesaid import, if no issue described in a preceding gift shall be born; or if there shall be no issue who shall live to attain the age, or otherwise answer the description required for obtaining a vested estate, by a preceding gift to such issue.

If, therefore, a legacy is given to *A.* (generally), and, if he dies without issue to *B.*, *A.* will not, by this bequest, take an absolute interest as he would before the statute; but he will now take, subject to the bequest over, on the event of his dying without leaving issue living at his death, to *B.*; but if the bequest be to *A. for life*, and if he dies without issue, to *B.*, there *A.* will not, as he would without the statute, take an absolute interest; he will not, in any event, take, under this latter bequest, more than a life estate; and if he should die leaving issue living at his death, then the ultimate interest would be undisposed of, for *B.* can only take in the event of *A.* dying without leaving issue.

In the case of *Re O'Bierne (p)*, Sir Edward Sugden, C., (I.) upon the effect of the above section of the act, observed, that in ascertaining whether the words "die without issue," in a will within the operation of the act, mean an indefinite failure of issue, an intention is not to be inferred from the use of those very words; therefore, if there is a gift to one for life, and if he die without issue, over, there the contrary intention does not appear, for in such a case, the supposed estate tail is an estate arising by implication only from the use of those very words.

SECT. III. Bequests of chattels real, &c. which give an estate for life to the first legatee, and an absolute estate to his issue as purchasers.

Bequests of
chattels, &c.
to first legatee
for life, and to
his issue as
purchasers.

But where, after the life interest of the first taker, the legacy is given *expressly* to *his issue* as purchasers, and in default of them, to other persons: or where the bequest is to *A. for life*, and after his decease to his *first and other sons* successively, and their respective issue, the Court will give effect to the several limitations over; there being no necessity to resort to the rule of inference or implication before mentioned. The reason is obvious, that the death of the first taker must decide, whether he will have any issue or not, and, if he have any, then, such issue or sons, in the cases supposed, will be entitled to the legacy absolutely;

but if he leave none, then the other limitations depending upon that event will take place according to their order; so that none of them tend to a perpetuity: for however numerous they may be, yet if none of the prior limitations take effect, the ultimate one will be allowed to prevail. For the cases illustrating the preceding exception, in which the bequest is to the *issue* (*q*), or the first and other sons, &c. (*r*), of the first taker, the reader is referred to the cases cited in the notes below.

Bequests of
chattels, &c.

To first legatee
for life, and to
his issue as
purchasers.

In regard to the preceding observations, Lord *Talbot*, in *Clare v. Clare* (*s*), intimated a doubt, whether, when the bequest was express to the issue, the limitation over to take effect in default of such issue were not void for remoteness, as limited after a general failure of issue: but this opinion or doubt of Lord *Talbot* appears to have been overruled by the several cases last referred to, and to be wrong upon principle; for it is obvious that there can be no danger of a perpetuity, as apprehended by his Lordship, the limitation (as before observed), being to take effect at all events within the compass of a life in being, or a few months afterwards; the executory bequest presents that species of alternative limitation which is termed a contingency with a double aspect, the ultimate bequest to the last taker, being not expectant upon and to take effect after, but cotemporary with, and in substitution of the bequest to the issue of the first taker. If the legatee or first taker for life, to whose issue the bequest is expressly named, have a child born answering the description, at any period during the life of such first taker, the absolute interest in the bequest will immediately vest in such child, so as to defeat all contingent bequests over, unless the time of vesting is suspended by express provision, for a further period of twenty-one years, which may be done as within the limit prescribed by the well known rule against perpetuities (*t*); any further observations upon which we shall postpone for the present, referring

(*q*) *Warman v. Seaman*, Finch. 279; *Sheffield v. Lord Orrery*, 3 Atk. 282, 287; *Marsh v. Marsh*, 1 Bro. C. C. 293; *Attorney General v. Bayley*, 2 Bro. C. C. 553; *Long v. Blackall*, 3 Ves. 486.

(*r*) *Higgins v. Dowler*, 1 P. Wms. 98; *Stanley v. Leigh*, 2 P. Wms. 686; *Sabbarton v. Sabbarton*, Forr. 245; *Phipps v. Mulgrave*, 3 Ves. 617.

(*s*) Forr. 21.

(*t*) *Duke of Bridgewater v. Eger-ton*, 2 Ves. sen. 121, more fully stated in 1 Bro. C. C. 280, in a note; *Trafford v. Trafford*, 3 Atk. 347; *Foley v. Burnell*, 1 Bro. C. C. 274; *Vaughan v. Burslem*, 3 Bro. C. C. 101; *Duke of Newcastle v. Countess of Lincoln*, 3 Ves. 387; 12 Ves. 218.

Bequests of
chattels, &c.

Executory as
distinguished
from executed.

the reader to a subsequent section (*u*), and in the meantime we proceed to the consideration of the subject next proposed.

SECT. IV. Of bequests *executory* or *inchoate*, as distinguished from bequests *choate* and *complete* in themselves.

The distinction between trusts executed and trusts executory in marriage articles and wills, is now well established; and it may be thus stated. Where the devise or trust is directly and wholly declared by the testator or settlor, so as to attach on the lands immediately, under the deed or will itself, it is a trust executed and complete, and must be construed strictly according to its legal import, and in analogy to corresponding limitations of legal estates; but where the devise, trust or agreement, is directory and incomplete; prescribing the intended limitation of some future conveyance or settlement directed to be made for effectuating it; there the trust is executory, and the Court of Chancery will not construe the devise or articles strictly, but will endeavour to discover the intention, and execute the trust according to that intention (*v*). This subject is so ably discussed by Mr. *Fearne*, in his admirable Treatise on Contingent Remainders, that a reference to his work is all that is requisite in this place, to show the application of the distinction, as it regards devises and settlements of estates of inheritance.

The application of the doctrine, however, to limitations of chattels real, and other personal estate, does not seem to be so well settled: for although it is clear that the Court will lend its aid in modelling incomplete dispositions of that species of property as well as of real estate, in order to effectuate the intention of testators and settlors, yet it is not settled to what extent, and in what mode the Court will lend its aid to effectuate such dispositions, when made by reference to limitations of real estate of inheritance.

Upon this subject a distinction has been taken between executory trusts in wills and in marriage articles (*w*); and it seems to have been incorrectly inferred from thence, that the Court will, in the one case, modify the strict legal import of the limitations in the articles, in order to effectuate the true intent of the settlors; but, in the other, will not interfere to carry into exe-

(*u*) Sect. 5.

Wal. 570.

(*v*) See per Lord *Eldon*, 1 Jac. &

(*w*) 3 Ves. 394.

cution the apparent intention of the testator, though imperfectly expressed. But this inference, it should seem, is at variance with principal and authority. The only distinction existing between articles and wills is, not that the Court will not, *when the intention can be discovered*, equally lend its aid to effectuate that intention in the one case as well as the other, but in executing the articles the Court possesses a guide in the object of the settlement, namely, a provision for the issue of the marriage, which is wanting in the case of a will, and has no other guide to the discovery of the motives and object of the will, than what is to be collected from the words of the will itself. So that if the articles for a settlement of real estate were to limit an estate for life, with remainder to the heirs of the body of the settlor, the Court will decree a strict settlement, in conformity with the presumable intention; but if a *will* directs a similar limitation, the Court has not such ground for decreeing a strict settlement; and if there were no other words to show that the testator did not intend to use those words in the strict technical sense, it has no guide to ascertain that he means one quantity of interest rather than another, an estate for life rather than an estate in fee. But if it can be clearly ascertained from the will, that the testator did not mean to use the words in the strict technical sense, the Court will effectuate that intention, when ascertained, equally as if the limitation occurred in articles (*x*). Any other distinction between the two cases would, as Lord *Eldon* observes in the *Countess of Lincoln v. The Duke of Newcastle* (*y*), shake to the foundation, the rules of equity. The Court, therefore, it may be safely concluded, would in either case effectuate the intention, *when once that intention can be clearly ascertained*, and it can be accomplished consistently with the rules of law. These observations are equally applicable to limitations of personal estate.

The first consideration, therefore, in cases of this sort, in a will, is to ascertain whether the bequest be executory or executed; whether, as it has been expressed, the testator has been his own conveyancer, undertaking to frame the limitations himself, or whether he intends a settlement to be made to effectuate the intention expressed.

That being settled, the next question is, whether, notwithstanding the executory nature of the expressions, the intention

Bequests of
chattels, &c.
Executory.

(*x*) Per Sir William Grant, in *Blackburn v. Stables*, 2 Ves. & Bea. 369; see also per Lord *Eldon*, C., in *Jervoise v. Duke of Northumberland*,

1 Jac. & Wal. 574; see also per Sir John Leach, V. C., in *Lord Deerhurst v. Duke of St. Albans*, 5 Mad. 260.

(*y*) 12 Ves. 227.

Bequests of
chattels, &c.

Executory.

be expressed in such a definite manner, as to enable the Court to act upon it?

It frequently happens that a testator, after limiting estates of inheritance to one or more tenants for life, with remainder to their first and other sons successively in tail male, with remainders over, directs that leaseholds or other personal estate *shall go and be enjoyed by the person or persons for the time being entitled to the real estates as far as the rules of law will permit*, or in words of similar import. A question has arisen in such cases, whether the clause, when it occurs in a will, is executory, or in other words, whether it amounts to a direction to settle? Another question has also arisen, whether the Court will carry such a direction into effect, and to what extent; and again, whether any difference exists, where such a direction occurs in marriage articles, and in the shape of a covenant or agreement to settle the personalty; and if so, to what extent, and in what mode the Court will carry such agreement or covenant into effect. In endeavouring to obtain a solution of these questions, where the law is settled, we shall first briefly consider the cases, which it must be confessed are conflicting; and, after an attempt to point out their discrepancies, to state their result, by drawing such conclusions as, it is presumed, they warrant. The reader will of course anticipate that this inquiry involves the consideration of the cases on the settlement of personal chattels as *heir-looms*.

The first case we shall cite is *Gower v. Grosvenor* (z). There Sir *Richard Grosvenor* devised his real estate to Sir *Thomas Grosvenor* for life; s. w. remainder to trustees to preserve, &c. Remainder to his first and other sons successively in tail male: with remainder to the testator's brother *Robert Grosvenor* for life, with remainder to his first and other sons in like manner. Then follows this clause, "and my will and mind is, that my library of books, jewels, plate, and furniture of my houses in ——— shall go as heir-looms, as far as they can by law, to the heir male of my family successively, as my real estate is hereby settled. Lord *Hardwicke* decided that as Sir *Thomas* had died without having had any issue, the limitation over to Sir *Robert* was good. This was the only point decided in the case; but the case furnishes the opinion of Lord *Hardwicke* as to the effect of the clause above given, which he considered directory (a). His Lordship also

(z) Burn. 54; also reported from MS.; 5 Mad. 337, 349.

(a) See Lord *Eldon*'s approbation

of this construction, 12 Ves. 231; The Countess of *Lincoln* v. Duke of *Newcastle*.

states the previous cases that bear upon the subject, and to which the reader is referred.

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The next case is *Trafford v. Trafford* (b), which was also the case of a will, and determined by Lord *Hardwicke*. There the testator devised his real estate in trust for *Sigismund Boehm* for life; remainder in trust for his first and other sons successively in tail male; remainder in trust for *Charles Boehm* for life; remainder in trust for his first and other sons, &c.; and then he bequeathed his plate, books, pictures, and household goods, of what nature soever, “to such male person, when he should attain twenty-one, who should then be entitled to the trust in possession of the real estate thereinbefore devised; and directed that until such male person should attain twenty-one, the said plate, &c., should be kept at *Dunton Hall*, and be used in the mean time by such male person residing there; declaring it to be his express will and desire, that the said plate, &c., might in the nature of heir-looms go with the said estate, and be used therewith, as long as the laws of this realm would permit. The testator appointed an executor, and bequeathed the residue of his personal estate to such person (when of the age of twenty-one), as by the will should be entitled to the trust in possession of the lands. The point decided by Lord *Hardwicke* was, that the words “such male person who should attain twenty-one,” did not refer to a tenant for life, but to the person who would be entitled to the inheritance by attaining twenty-one. His Lordship recognised his determination in the preceding case of *Gower v. Grosvenor*; and further observed, that in the case before him, there was a direction to executors, whom, by virtue of the last clause, he made trustees, for the purpose of effectuating the succession of the chattels. Lord *Eldon* in his observations (c) on this case, seems to have considered the bequest as clearly executory. The reader will observe that a leading feature in the last case is, that the testator expressly specifies the age of twenty-one, as the period of taking the chattels.

The two preceding cases, Lord *Thurlow* remarks in *Foley v. Burnell* (d), prove no more than that the will might be such that

(b) 3 Atk. 347.

(c) In the Countess of *Lincoln v. Duke of Newcastle*, 12 Ves. 232; see also his Lordship's observation on the limitation “to such male,” &c., as taken altogether, being too re-

mote; see also Lord *Southampton v. Marquis of Hertford*, 2 Ves. & Bea. 54; and *Marshall v. Holloway*, 2 Swan. 432.

(d) 1 Bro. C. C. 274, *infra*.

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the first taker should not take the whole; this observation, with some qualification, is correct.

Bridgewater v. Egerton (e) is also a case of a will. There the testator bequeathed thus: "I desire that my books in town and country should be deemed and taken as heir-looms, and shall go to such persons as shall be entitled to the possession of my capital mansion house at A., by virtue of the limitations of my settlement." The uses of the settlement were in the usual mode to the testator for life, and to his first and other sons successively in tail male. It was decided by Lord *Hardwicke*, that the books vested in the then late *John Duke of Bridgewater*, the first tenant in tail, who died an infant and unmarried.

The next case is *Foley v. Burnell* (f), also a case of a will, whereby Lord *Foley* devised his real estate to his second son *Edward Foley* for life, with remainders in strict settlement to his first and other sons successively in tail male; with remainders to the plaintiff *Andrew Foley* for life, in like manner; and bequeathed all his standards, fixtures, household goods, furniture, fixtures, &c. &c. "which should be at either of his houses, to be held and enjoyed by the several persons, who from time to time should respectively and successively be entitled to the use and possession of the same houses respectively, as and in the nature of heir-looms to be annexed and go along with such houses respectively for ever." Upon the bill of *Andrew Foley* and his son to have the personalty secured, Lord *Thurlow* decided, that as the first taker *Edicard* had had a son tenant in tail, who died soon after his birth, the chattels vested in him, and his father took them as his representative. The case was heard again before the Lords Commissioners *Loughborough*, *Ashurst*, and *Hotham*, who confirmed the decree; and, upon appeal to the Lords, their decree was also affirmed. Lord *Loughborough* seems to have been of opinion, that the clause was executory, but that the Court would not act upon an intention so imperfectly expressed, and that, therefore, it could go no further than the clear devise; otherwise it would not be to construe, but to make a will upon probability only. Lord Commissioner *Ashurst* observed, that where the testator left it to the Court to make the conveyance, the Court

(e) 1 Bro. C. C. 280; S. C. 2 Ves. sen. 122.

(f) 1 Bro. C. C. 274, *infra*; and

see *Conduitt v. Soane*, 1 Coll. (C.), 285, as to the practice of tenant for life giving security for heir-looms.

would protect the property, as far as might be (g). Upon the last case Lord *Eldon* observes (h), the clause was directory, which a Court of Equity would mould to the purposes of the testator upon its general principles. There never was a case, in which Lord *Hardwicke*'s reasoning might more properly apply; and yet a son who lived only a few weeks was taken to be *persona designata* under the words "who from time to time should respectively and successively be entitled." His Lordship then states Lord *Thurlow*'s opinion to have been (but which does not appear from the judgment as reported), that if the testator did not give explicit directions as to his meaning, there was only the choice either to say the leaseholds vested *eo instanti* the child was born, or to carry the limitations to the utmost extent the law would admit; and the clause in Lord *Foley*'s will did not enable the Court to take the latter course. This should seem, however, to have been the substance of Lord *Loughborough*'s opinion.

Thus far it would appear, that all the cases correspond in considering the clauses in question as executory, but there is a difference of opinion as to the carrying the testator's direction into effect. In the cases of *Gower v. Grosvenor* and *Trafford v. Trafford*, Lord *Hardwicke* was of opinion, that the Court might have carried the intention in limiting the absolute enjoyment of the chattels, not as far as the law would admit, but to a convenient extent, so as to keep the real and personal estate together (i); while in *Bridgewater v. Egerton* his Lordship decided, that the infant tenant in tail became absolutely entitled at the moment of its birth, notwithstanding the clause in the will directed the books should go as heir-looms to the persons, &c. entitled to the mansion house under the limitations in the settlement. The clause in the case last alluded to did not contain the words "as far as the law would permit;" and, perhaps, his Lordship did not, upon the whole construction of the will, consider the Court justified in adopting any modification of the chattels, similar to that suggested in his judgment in *Gower v. Grosvenor*. The subsequent case of *Foley v. Burnell* decided, that though the clause was executory in its intendment, the intention was too vaguely expressed to furnish the Court with a sufficient guide to carry it into execution.

(g) Upon this *dictum* see Lord *Eldon*'s observations, 12 Ves. 235.

(h) *Ib.* 234.

(i) 5 Mad. 348, 349; 3 Atk. 348, 349.

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The next case is *Vaughan v. Burslem* (k), wherein the testator directed that the chattels should go as heir-looms with the real estates, (which were limited to his daughter for life, and to her first and other sons, &c. in strict settlement), and be held and enjoyed *by the person or persons, who should for the time being by virtue of his will be entitled to his said estates, as far as the rules of law and equity would permit.* Lord Thurlow thought that the last words in the clause made no difference between that case and *Foley v. Burnell*, and held, that the chattels vested absolutely in the first son tenant in tail, and went to the father as his representative; his Lordship being of opinion, that the words did not allow the Court to tie up the property, as long as the law would allow.

The case of the *Countess of Lincoln v. The Duke of Newcastle* (l) is next in order of time, but differs from the preceding cases in the circumstance of its being the case of a covenant to settle the personalty in a *marriage settlement*. There, by a deed of settlement on the marriage of *Henry Earl of Lincoln*, eldest son of the Duke of *Newcastle*, real estates were limited to the said Earl for life; with remainders to his first and other sons successively in tail male: with remainders to *Thomas Pelham Clinton*, the Duke's second son, for life; with similar remainders to his first and other sons, with like remainders to the Duke's third son. In the settlement *Henry Duke of Newcastle* covenanted to assign certain leasehold estates, in trust for, and for the benefit of *such person and persons, and for such and the like estate and estates, and for such and the like uses, intents, and purposes, as were thereinbefore mentioned of or concerning the freehold estates thereinbefore limited, so far as the law in that case would allow and permit.* The marriage took effect. *Henry Earl of Lincoln* died in the lifetime of *Henry Duke of Newcastle*, leaving issue of the marriage one son, *Henry Pelham Clinton*, and one daughter, *Catherine Pelham Clinton*. The son afterwards died without issue; and then *Henry Duke of Newcastle* was succeeded in the title by the said *Thomas Pelham Clinton*, his only surviving son, who afterwards died leaving *Henry*, his eldest son, on whose behalf a bill was filed to have the covenant executed. The Countess of *Lincoln*, the widow of Earl *Henry*, and his daughter, Lady *Catherine Pelham Clinton*, claimed to be entitled absolutely to the leaseholds, as the representatives of the infant tenant in

(k) 3 Bro. C. C. 101; see also
Ware v. Polhill, 11 Ves. 257.

(l) 12 Ves. 218, 230.

tail. Lord *Loughborough* directed the covenant to be executed by a settlement of the leaseholds in trust for *Henry*, the then Duke of *Newcastle*, his executors, administrators, and assigns; but if he died under the age of twenty-one years, without leaving issue male of his body living at his decease, then in trust for *Thomas Pelham Pelham Clinton*, his brother, in like manner; then in trust for *Lady Catherine Pelham* in like manner, with several similar limitations or trusts over. There was an appeal from this decree to the House of Lords, who, at the suggestion of Lord *Ellenborough*, reversed that part of the decree, which followed the words, "*Henry Duke of Newcastle*, his executors, administrators, and assigns;" the Duke, who was a minor at the time of the decree, having since attained twenty-one. Lord *Ellenborough* and Lord *Eldon* considered the decree irreconcilable with that of Lord *Thurlow* in *Vaughan v. Burslem*. Lord *Eldon* also observed, it was wrong also on another point; that it went upon a supposed distinction between marriage articles and wills, observing, "There is a distinction, if the will makes a direct gift, and the articles contain a covenant: but the distinction between marriage articles and an executory trust under a will is new to me. Lord *Hardwicke's* opinion in two cases upon wills is directly contrary to that of Lord *Thurlow*, expressly upon the point that those were not cases of direct gift, but a direction how the property was to be held and enjoyed; under which direction, a conveyance or settlement was to be made. Upon such an executory trust the same principle prevails as upon marriage articles."

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The last case seems to have settled this point, that under an executory clause or covenant in marriage articles, for settling chattels with reference to a series of limitations in strict settlement, the chattels shall *not vest absolutely in the first tenant in tail dying under twenty-one*, as was decided in the preceding cases in wills; but it affords no guide as to the mode in which the Court would direct the trusts in execution of such a covenant to be framed.

The subsequent cases occurred upon wills: the first is *Carr v. Lord Erroll* (m). There freehold estate, by the will of Sir *William Carr*, was limited (in events which happened) to *Lady Charlotte Hay* for life, with remainder to her first and other sons successively in tail male. The testator directed that certain plate and furniture at his mansion-house at *E.* should remain as

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heir-looms, and devised the same to trustees, upon trust, to permit the same to go together with the mansion-house, "to such person or persons, as should from time to time under his will become entitled to it, for so long a time as the rules of law and equity would permit;" and desired that an inventory should be taken by the executors. Lady Charlotte Hay died, leaving an infant son, who became entitled to an estate tail male in the devised estates. Upon his death, an infant and without issue, the chattels directed to go as heir-looms were claimed by his father as his personal representative; and the question was, whether the words of the will did not carry over the chattels to the persons entitled to the settled estates, so as to prevent their vesting absolutely in the infant son of Lady Charlotte Hay. Sir William Grant decided that they vested absolutely in the infant son; observing, that he could not discover any substantial difference between that case and *Vaughan v. Burslem*; the only difference in this case and that was, the bequest to trustees; but that he could not see in the trust anything *executory*; so that the question, whether there was any difference between an executory trust in a will and articles did not there arise; and that the decree for the plaintiff in that case would not interfere with anything discussed in the case of the *Duke of Newcastle v. The Countess of Lincoln*.

The case which followed was *Lord Deerhurst v. The Duke of St. Albans* (n). There Lord Vere, by will, in 1781, bequeathed to trustees all his household goods, furniture, pictures, books, &c., which should be at his mansion at *Hanworth*, upon trust for his wife Lady Mary Vere for life, and after her decease for his son Aubrey Beauclerk for life; and after the death of the survivor of them, upon trust that the trustees should stand possessed thereof *in trust for such person as should from time to time be Lord Vere; it being his will and intention that the same should, after the decease of his said wife, go and be held and enjoyed with the title of the family, so far as the rules of law or equity would permit*. The testator directed the residue of his personal estate to be laid out in lands to be settled upon his wife Lady Vere for life, with remainder to his son Aubrey Beauclerk for life, with remainder to the testator's grandson Aubrey Beauclerk for life, with remainder to the first and other sons of his said grandson, successively in tail male; with remainders to William Beauclerk, second son of Aubrey Beauclerk (the son) for life, and to his first and

(n) 5 Mad. 232.

other sons, &c. The title descended to *Aubrey Beauclerk*, the son, who was second Lord *Vere*, and afterwards fourth Duke of *St. Albans*, from him to *Aubrey Beauclerk*, the grandson, third Lord *Vere*, and fifth Duke of *St. Albans*, who died in 1815, leaving an infant son *Aubrey*, the fourth Lord *Vere*, and sixth Duke of *St. Albans*, who died in 1816, whose sister of the half blood and only next of kin, Lady *Mary Deerhurst*, claimed the chattels, in opposition to the claim of the present Duke of *St. Albans*, the next tenant in tail in possession. The case was very ably argued on behalf of the plaintiff; and Sir *John Leach*, V. C., decided, that the chattels vested absolutely in the late infant Duke, and was of opinion, that the gift contained nothing executory; the former part containing words of direct gift, the remaining part merely expressive of the intention, that the absolute interest should not vest in any person for the time being Lord *Vere*, who might by the rules of law and equity be limited in the use and enjoyment only (o).

The preceding decision was confirmed by Lord *Lyndhurst*, C., and subsequently reversed in the House of Lords. *Aubrey*, the fifth Duke, by his will dated 18th *July*, 1814, gave the residue of his personal estate to his wife, *Louisa Grace*, Duchess of *St. Albans*: and appointed her sole executrix. *Louisa Grace* survived the infant, the sixth Duke, and by her will, dated the 28th *November*, 1815, bequeathed the residue of her personal estate to her sister, Lady *Laura Tollemache*, the appellant; and appointed her sole executrix; who proved the will and took out letters of administration to *Aubrey*, the third Lord *Vere*, and fifth Duke, with his will annexed. Lady *Laura Tollemache*, as the representative of *Aubrey Beauclerk*, the grandson, the third Lord *Vere*, and fifth Duke of *St. Albans*, appealed (p) to the House of Lords against so much of the decree in the Courts below, as declared Lady *Coventry*, late Lady *Mary Deerhurst*, to be absolutely entitled to the chattels in question. It was urged on behalf of the appellant, that the gift was to a class of persons in succession, as Lords *Vere*, and not to individuals; that the bequest was not to the person who should be first taker of the title of Lord *Vere*, after the death of the survivor of the testator's widow and son, which would have been good; for it must of necessity have vested within the prescribed limit, against per-

(o) From this decision there was judgment.

an appeal to Lord *Eldon*, upon which (p) *Tollemache v. Coventry* 2 Cl. his Lordship did not pronounce a & Fin. 611.

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petuities; but that it was to such person as would be Lord *Vere* next in succession, after such first taker of the title; and was not a bequest which must necessarily vest within a life or lives in being at the death of the testator and twenty-one years after: that no bequest over upon the death of such first taker could be valid, unless in favour of some person who must of necessity be in existence within the above period. Lord *Brougham*, C., in moving the House of Lords for a reversal of the decree of the Court below, observed, that Lady *Laurà Tollemache* must prevail, if *Aubrey*, third Lord *Vere*, took an absolute vested interest in the personalty; and that it was equally clear, that, if *Aubrey*, the fourth Lord *Vere*, took an absolute estate, Lady *Coventry*, as representing him was entitled; and it was also clear, that *Aubrey*, fourth Lord *Vere*, took an absolute interest, if the gift was by limitation over to Lord *Vere*, such as to carry an estate for life only to *Aubrey*, the third Lord *Vere*, he being *in esse* at the date of the will, and at the death of the testator; and consequently his first unborn son would take an absolute interest. The question, therefore was, whether or not the testator had done that which the rules of law permitted, when he made the limitation, not to a series of persons *in esse*, and to the survivor of them, and to the first and other sons of that survivor; but a limitation to one person *in esse* by name, as purchaser, with remainder to all persons, who, from time to time, should successively become Lord *Vere*, as far as the rules of law and equity would permit; from which last limitation this implication was sought to be raised, that the first unborn issue of the last person answering the description of Lord *Vere*, and *in esse* at the date of the will and death of the testator, should, according to the analogy of the rules of law, take an absolute interest; the prior taker only taking an estate for life; his Lordship adding, a question of difficulty, and undoubtedly without precedent. After adverting to the prior decisions cited, as referring to the principal case, his Lordship urged the difficulty of annexing chattels personal to a title, whether the title was a series of life estates, or of estates of inheritance; that it was a limitation unknown to the law treating Lord *Vere*, as if he were a corporation with perpetual succession; that though the third Lord *Vere* was alive at the time of the will, and you gave to the fourth Lord *Vere* his unborn issue, that which the rules of law would enable you to give, if the event had happened, yet that the construction of the instrument must not be governed by the event that had accidentally happened: he further argued, that if chattels were to go

with a title, the interest in those chattels, by abeyance, if the title were a barony in fee, or if in tail by suspension through attainder, might be suspended from vesting for more than a century. That it was a fallacy to say that the Lords *Vere* were all *in esse*; and that, at the death of the testator, or rather the date of the will, that Lord *Vere* was *in esse*, on the failure of whose life estate, the fourth Lord *Vere*, the first unborn issue, took. The man was *in esse*, the individual *Beauclerk*, who afterwards happened to become Lord *Vere* was *in esse* at the time; but there was not a Lord *Vere in esse*, nor, *ex vi termini*, could there be said to be a Lord *Vere in esse*, till that individual, whom, *quasi* individual, we admit to have been *in esse*, came to be Lord *Vere*. That construction of the will must be made either with reference to the natural or politic capacity of Lord *Vere*, and not to both; that for one purpose to escape the rule against perpetuities, you cannot regard the person taking to be a natural man, and for another purpose, bring in a fourth Lord *Vere*, to defeat the interest of the third Lord *Vere*; that according to his politic capacity, the fourth Lord *Vere* was not in existence. The House of Lords, in accordance with his Lordship's motion, reversed the decrees of the Vice Chancellor and Lord *Lyndhurst*.

In *Mackworth v. Hinxman* (q), the testator bequeathed personal estate to his executors, in trust to pay the interest and dividends and profits thereof to his nephew, Sir *Gilbert Affleck*, Bart. for life, and after his death to his eldest son for the time being; but if his nephew should die leaving no son, then to the person on whom the baronetcy should devolve, it being his will, that the interest, &c., should never be alienated from the title, but that each succeeding Baronet should enjoy the interest, &c., for life; and after the extinction of the title, to fall into his residuary estate. At the death of the testator, Sir *Gilbert* had two brothers living, *James* and *Robert*, on whom the baronetcy successively devolved. Sir *Gilbert* died without ever having had any issue: on the death of Sir *James*, his executors claimed the absolute interest in the personal property, insisting that Sir *James* was upon the true construction of the will *quasi* tenant in tail, and absolutely entitled. For Sir *Robert* it was insisted, that as he and Sir *James* were the only persons in existence, who, by the rules of law, could take life estates under the dispositions of the will, the testator must have intended, that in the events which had happened, they should take life estates only; and that the

(q) 2 Keene, 658.

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last person, to whom a life interest, capable of taking effect under the rules of law, was limited, would become absolutely entitled. Lord *Langdale*, M. R., however, decided that Sir *James* took an absolute interest as *quasi* tenant in tail.

Having stated the cases of dispositions of chattels with reference to limitations in strict settlement, so far as the rules of law or equity will permit, the following observations occur; but which the editor presents to the reader with diffidence. Lord *Hardwicke*'s opinion clearly was, that such words were executory, and afforded ground for a Court of Equity to model the limitations of the personal estate; not to the ultimate limit the law would allow, but to such a convenient extent, as to execute the general primary purposes of the will or settlement, by carrying together the real and personal estates. Lord *Eldon* has expressed his opinion, that this would have been the better mode of construing the words; and which, had it been *res integra*, he should have adopted. His Lordship, however, admitted that that construction had been overruled; for we find that it was not adopted by Lord *Thurlow* in *Foley v. Burnell* and *Vaughan v. Burslem*. Those cases have determined that the clause in question occurring in a will, does not afford sufficient indication of intention, as to the mode in which the direction was to be carried into effect; and that the Court, labouring under the difficulty of determining the intermediate modifications the testator intended between the vesting in the tenant in tail, at the moment of his birth, and the carrying the limitations to the utmost extent the law would allow, was therefore under the necessity of deciding that the interest vested in the infant tenant in tail at *his birth*. This mode of construction has been followed by the subsequent cases, which, as we have seen, considered the words of bequest as containing nothing executory. The result of which is to reduce the clause under discussion in a *will* to a direct bequest; and there is now no difference in effect between such a limitation of chattels, with reference to limitations in strict settlement, and an immediate bequest to the first taker for life, and after his decease to his first son in tail, and the heirs or issue male of his body.

It appears, therefore, to be immaterial, whether the direction, as to the enjoyment of the chattels, refers to the limitations of freehold estates already settled (*q*), or to the lands to be pur-

(*q*) As in *Gower v. Grosvenor*, *Egerton*, *Foley v. Burnell*, *Vaughan v. Burslem*, *Trafford v. Trafford*, *Bridgewater v.*

chased with the produce of residuary personal estate (*r*); or whether the chattels are directed to be so enjoyed generally, or be bequeathed to trustees (*s*), or to the objects themselves (*t*); or whether the limitations are directed as far as the rules of law will permit, or without those words (*u*), or for ever (*x*); but not in reference to the enjoyment of a title (*xx*).

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Nor, it should seem, will the case be different, although the testator actually direct a *settlement to be made*, unless he give some more definite intimation of intention than the words in the clauses before considered (*y*).

But if the will afford a clue to the testator's meaning as to the modifications of the limitations of the chattels, as by declaring that the absolute enjoyment is to be postponed *to the age of twenty-one*, there the Court will effectuate the intention, it being within the prescribed limits of executory devise (*z*).

In regard, however, to a covenant in a settlement, or articles for settling chattels real and other personal estate, with reference to limitations of real estate so far as the rules of law will permit, or with words of similar import, the rule of construction is different from that of similar words in a will; upon the distinction before noticed of the guide, which exists, in the former case, to the discovery of the intention of the settlor, which is wanting in the latter; but the construction is not at present settled.

That such a difference in the construction of the clause under consideration exists in the case of a covenant in marriage articles appears, as before noticed, from the decision of the *Countess of Lincoln v. The Duke of Newcastle*. But with reference to the mode of carrying such a covenant into effect, there appears to be considerable difficulty.

In *Foley v. Burnell*, Lord Commissioner *Ashurst* said, that the Court would protect the property as far as might be; but that *dictum* is expressly denied to be law by Lord *Eldon*, in the case last alluded to, who said the Court never had done that. His

(*r*) As in *Lord Deerhurst v. Duke of St. Albans*.

(*s*) As in *Carr v. Lord Erroll, The Duke of Newcastle v. The Countess of Lincoln, Tollemache v. Earl and Countess of Coventry*, 2 Cl. & Fin. 372; *Lord Deerhurst v. Duke of St. Albans*.

(*t*) As in *Trafford v. Trafford*, *supra*, p. 1533.

(*u*) *Bridgewater v. Egerton*, 1

Bro. C. C. 280; *Vaughan v. Burslem*, 3 Bro. C. C. 101, per Lord *Thurlow*.

(*x*) As in *Foley v. Burnell*.

(*xx*) *Tollemache v. Earl and Countess of Coventry*, 2 Cl. & Fin. 611.

(*y*) *Blackburn v. Stables*, 2 Ves. & Bea. 370; *Jervoise v. The Duke of Northumberland*, 1 Jac. & Wal. 572.

(*z*) *Trafford v. Trafford*, *supra*, p. 1533.

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Lordship further observed, that the best rule would have been for the Court to tie up the property, not as long as the rules of law would permit, but to a convenient extent. But although Lord *Hardwicke's* mode of interpreting and executing the clause cannot, as the cases have now settled it, be adopted with respect to wills, there appears to be no reason why it should not be resorted to in the case of a covenant in marriage articles.

Sir *William Grant* (a), and Lord *Eldon* (b) remarked, that the marriage articles (the object being a provision for the issue) afford a *prima facie* evidence of intention, which is wanting in executory trusts under a will.

The case of the *Countess of Lincoln v. The Duke of Newcastle*, as we have observed, came to no decision as to the *mode*; it merely decided that the chattels do *not* vest absolutely in the first tenant in tail dying an infant. The good sense of Lord *Hardwicke's* rule of interpretation, approved by Lord *Eldon*, would probably be followed, but the particular mode in which the Court would frame the trusts of the personalty, must, of course, in each particular case, depend in a great measure upon the limitations of the real estate, to which the enjoyment of the chattels is to be annexed. Upon this subject the following observation of Lord *Eldon* (c) is well deserving consideration: his Lordship remarks, "Lord *Hardwicke* says, it is the practice of conveyancing to limit leasehold estates to a tenant for life, then to the son, either to be absolutely vested in him when he shall attain the age of twenty-one, or upon his birth, to be divested if he died under the age of twenty-one; and to go over, but not upon the simple contingency of his death under the age of twenty-one, as Sir *Joseph Jekyll* says (d); but if he shall die under the age of twenty-one without issue generally, if the object be to limit an estate tail general; or without issue male, if an estate in tail male be the object." Upon this quotation Lord *Eldon* continues, "But this is not carrying it as far as the law will permit; for the moment a son comes to the age of fourteen, he may, subject to the contingency of his death under the age of twenty-one, not leaving issue male, bequeath the leasehold estate. Suppose he dies under the age of twenty-one, leaving issue male, that issue male would not take the leasehold estate, as he would the real estate: but the leasehold estate would be

(a) In *Blackburn v. Stables*, ubi *umberland*, ubi *supra*.
supra. (c) 12 Ves. 229.

(b) In *Jervoise v. Duke of North-* (d) 2 P. Wms. 690.

part of his general personal estate; which may go to his next of kin, and equally to the wife with them; or in some parts of the kingdom, the larger portion to the wife. Therefore the proposition, that the leasehold estate is made unalienable, as long as the rules of law permit, as was said by Sir *Joseph Jekyll* and Lord *Hardwicke* is not true in any sense: one sense of those words being that you are to make use of all the modifications and limitations the law will admit, to select those that will enable you to execute the primary purpose, to knit together the two estates, as long as the law will admit.”

Bequests of
chattels, &c.

Executory.

His Lordship did not point out, nor indeed was he called upon to suggest the most convenient and proper mode of modifying the trust of the personal estate, in analogy or correspondence with the limitations in strict settlement in the case before him; the difficulty of pointing out that mode was avoided by the suggestion of Lord *Ellenborough*, which the Lords adopted; so that that decision, as Lord *Eldon* justly observes, cannot serve as a guide to conveyancers as to what is to be done *under any other circumstances than a tenant in tail in possession attaining the age of twenty-one*. It might be expected that great Judges would differ as to the practice of conveyancers in their mode of framing the trusts of leaseholds and other chattels, in execution of such a covenant in marriage articles, since the opinions and practice of conveyancers themselves always have been, and, at the present time, continue unsettled.

The cases authorize us to say, that the mode which has been too commonly adopted of declaring the trusts of personalty or covenanting for their being settled by a general reference to the limitations of real estate settled in strict settlement, or as near thereto as may be, or as the rules of law and equity will allow, is a very objectionable mode; for, as Mr. *Butler* observes in his very valuable note (1), on Co. Lit. 290, b. sect. 10, the nature of real and personal estate is so different as to make it almost impracticable to form such a set of trusts as will in every possible event, or even in the common contingencies, carry the personal estate in the same course of devolution as the real estate; and the modes of doing so are so various that hardly two professional men would agree upon the same plan.” The same learned writer recommends as the best method, to insert a complete set of limitations for the personal estate. When, however, the smallness of the property or other circumstances require brevity, the trusts may be declared by general reference, taking care to insert a proviso declaring that the leasehold or other personal estate

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shall not vest absolutely in any child or children of any tenant for life, unless or until he, she, or they shall attain the age of twenty-one; with a further proviso that such child for the time being may during minority be entitled to the rents and interest. If the subject be not productive as in the case of chattels to go as heir-looms, the last proviso is of course inapplicable and unnecessary. The mode just mentioned is probably more usual than that of setting out the trusts at length, and will have the effect of keeping the real and personal estates together, until some one person becoming tenant in tail would have the power of absolute disposition of both.

SECT. V. Of bequests of chattels real, &c., which in devises of estates of inheritance would, strictly speaking, be executory devises.

We proceed to bequests of chattels real and other personal estate, which in devises of real estate would, strictly speaking, be *executory devises*.

I. After a life
or lives in being,
and 21 years
afterwards.

I. Limitations to take effect after a life or lives in being and twenty-one years after.

The law admits of executory bequests of chattels with any number of successive limitations, so that they are made to take effect within a life or lives in being, and twenty-one years, and a further period of gestation of a few months after. Therefore, if a limitation over of personal estate, on the event of a dying without issue, which would be void (*e*), be restrained to the death of the first taker (*f*), or of any other person then *in esse* (*g*); or if such limitation depend upon the death of such issue under the age of twenty-one (*h*); or be limited so as to take effect

(*e*) *Grey v. Shawne*, 1 Eden, 153; *Grey v. Montagu*, 2 Eden, 205; *Jeffery v. Sprigge*, 1 Cox, 62; *Boehm v. Clarke*, 9 Ves. 580; see also *Ib.* 202; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 484; *Campbell v. Harding*, 2 Russ. & M. 390, aff. D. P.; 8 Bli. 469; 2 Cl. & Fin. 421, as *Candy v. Campbell*, *Carter v. Bentall*, 2 Beav. 551; *supra*, p. 100; *Pye v. Linwood*, 6 Jur. 618; *Lepine v. Ferard*, 2 Russ. & M. 378.

(*f*) *Oakes v. Chalfont*, and the Duke of Norfolk's case, Pollexf. 38, 223; *Massenburgh v. Ash*, 1 Vern. 304; *Pawlet v. Doggett*, 2 Vern. 86;

Fletcher's case, 1 Eq. Ca. ab. 193, pl. 10; *Nichols v. Hooper*, 1 P. Wms. 198, commented upon, 2 Atk. 313; *Pinbury v. Elkin*, *Ib.* 563; *King v. Cotton*, 2 P. Wms. 676; *Sabbarton v. Sabbarton*, Forr. 245; *Chamberlain v. Jacob*, Amb. 72; *Kirkpatrick v. Kirkpatrick*, 13 Ves. 481, 486.

(*g*) *Lamb v. Archer*, 1 Eq. Ca. ab. 192, pl. 8; *Small v. Denny*, 1 Wils. 270.

(*h*) *Salkeld v. Vernon*, 1 Eden, 71; *Sheffield v. Lord Orrery*, 3 Atk. 282; *Penn v. Barclay*, 14 Ves. 122; 2 Sim. & Stu. 214.

twenty-one years after a life in being (i), it will be valid upon the happening of those contingencies. To this extent the policy of the law has permitted personal estate to be locked up in settlement; but there is no instance, in which the vesting of this species of property has been allowed to be postponed to a farther period, and every attempt to effectuate it has been frustrated by the decisions of Courts of Justice(j).

Bequests of
chattels, &c.

It may be here observed, that where there is a limitation to take effect in either of two events, one of which is too remote, but the other not, if the latter happen, the limitation will take effect (k).

II. Where the general import of the words "*after failure of issue*" has been restrained to the legal period.

II. Where the
general import
of the words
"*after failure
of issue*" has
been restrained.

But notwithstanding a bequest of a chattel to take effect after a general failure of issue is void, the Courts of Justice, in their anxiety to support the dispositions of testators, have admitted very slight circumstances to confine the generality of the words "*dying without heirs or issue*" to a legal period (l). And—

1. Where the limitation is to two or more, followed by a gift, in case of failure of issue, to the survivors or survivor.

1. Where the
gift is to two,
followed by a
bequest to the
survivor, after
failure of issue
of the other.

Thus, if a legacy were given to *A.* and *B.*, and if *either of them died without issue*, then to the *survivor*, the limitation would not be too remote, as the testator would be intended to give a *personal* benefit to the surviving legatee; which construction would confine the dying of either of them without issue to the time of the parent's death.

Thus, in *Nicholls v. Skinner* (m), portions were bequeathed to

(i) *Maddox v. Staines*, 2 P. Wms. 421; *Sabbarton v. Sabbarton*, Ca. Tem. Tal. 245; *Sheffield v. Lord Orrery*, 3 Atk. 282; *Thackeray v. Hampson*, 2 Sim. & Stu. 214; see also *Murray v. Addenbrook*, 4 Russ. 418.

(j) *Lade v. Holford*, 3 Burr. 1416; Black. Rep. 428, S. C.; *Phipps v. Kelynge*, Fearne, Cont. Rem. 10 ed. Appendix, 5; *Cambridge v. Rous*, 8 Ves. 12, 24; *Lord Southampton v. Marquis of Hertford*, 2 Ves. & Bea. 54; *Marshall v. Holloway*, 2 Swanst. 450; *Bull v. Pritch-*

ard, 1 Russ. 213; 11 Jur. 34; *Hayes v. Hayes*, 4 Russ. 311; *Palmer v. Holford*, Ib. 403; *Arnold v. Congreve*, 1 Russ. & M. 209; *Hunter v. Judd*, 4 Sim. 455; *Kampf v. Jones*, 2 Keene, 756; *Dodd v. Wake*, 8 Sim. 615; *Ibbetson v. Ibbetson*, 5 Myl. & Cr. 26; *Viscount Dungannon v. Smith*, 12 Cl. & Fin. 546.

(k) *Longhead v. Phelps*, 2 W. Bl. 704; *Minter v. Wraith*, 13 Sim. 52.

(l) *Brooks v. Taylor*, 8 Vin. Ab. tit. (Devise), p. 313, pl. 33.

(m) Pre. Ch. 528.

Bequests of
chattels, &c.

Where gift is
to two, followed
by bequest to
survivor.

the testator's four children, to be paid to them at their respective ages of twenty-one, or days of marriage; and in case any of them should die before the time of payment, or should die without issue; then his or their share to go to the survivors and survivor of them, and his heirs. One of the children died without issue under age, and unmarried: and Sir *Joseph Jekyll* decided that the limitations over being to the survivors and survivor of them, and his heirs, it could not be intended a dying without issue generally, which would make it void: but dying without issue in such a manner, that the survivors or survivor might take it, which must be during their lives, and consequently good. That it was liable to the contingency of surviving until it came to the last, and consequently that the plaintiff, one of the surviving brothers, could not have his share of the principal paid to him, but only the interest.

The last case, however, was cited by Lord *Northington*, then Lord Keeper *Henley*, in his judgment in *Gray v. Shawne* (n), and disapproved. His Lordship very forcibly observes upon the above case, "One of the events having happened of a dying before the payment accrued, and it not being contended that it was a conjunctive contingency, and that "*or without issue*" meant "*and without issue*," I do not see how that question could arise; but as to the reason given, because the limitation over was to the survivors, I see no more force in that to restrain the words, than if it had been given to particular legatees" (o).

In *Hughes v. Sayer* (p), the testator devised the surplus of his personal estate to his two nephews, and if either of them should die without children, then to the survivor. Sir *Joseph Jekyll*, M. R., held, that the words "dying without children" must be taken to be a dying without children then (namely, at the death of the parent) living, because the immediate limitation over was to the surviving devisee.

We may here notice a devise of real estate in *Doe v. Knowls* (q), since it is conceived a similar construction would be adopted in a bequest of personalty. The testator devised real estate to *W. S.* and *M.* his wife, for their lives, and the life of the survivor: and then to their daughter *Mary*, or if more children, by *M.*, the wife of *W. S.*, equal between them; and *in case they leave no children*,

(n) 1 Eden. 157.

(o) The case of *Nicholls v. Skinner*, is cited by Fearne, ed. 10th, 472.

(p) 1 P. Wms. 534; *Turner v.*

Frampton, 2 Col. (C.), 331.

(q) 1 Bar. & Adol. 324; see also *Ranelagh v. Ranelagh*, 2 Myl. & K.

441; 4 Beav. 419.

to their heirs and assigns. *M.* died in the lifetime of her husband *W. S.*, leaving one only child, the said *Mary*. The daughter *Mary* died in her father's lifetime. He devised the estate to two persons on certain trusts: the question was, whether the devisees of *W. S.* or the heir-at-law of the testator were entitled; which turned upon the construction of the words "*in case they leave no children.*" It was contended for the heir-at-law, that the limitation over could not take effect, if there was a child living at the death of *either* parent, which event happened. But the Court of *B. R.* held, that the true construction of the devise was, in case there should be no child of the said *W. S.* and *M.* his wife living at the death of the survivor.

Bequests of
chattels, &c.

Where failure
of issue con-
fined to death
of person
taking.

2. Where the general limitation is followed by the words "*then after the decease*" of the person, upon the failure of whose issue the limitation over is to take effect.

2. Where the
general failure
of issue is con-
fined to the
death of the
person taking.

Where a testator bequeaths a term or other personal estate to *S.* and the heirs of his body, and to their heirs and assigns for ever, but in default of such issue, *then after the decease* of *S.* to *B.*, the generality of the words, which standing uncontrolled would have given the absolute interest to *S.*, will be restrained to mean issue living at the decease of *S.* This was decided in the case of *Wilkinson v. South (q)*.

So in *Pinbury v. Elkin (r)*, where the testator gave all his goods and chattels to his wife, whom he made executrix; and declared that if she should die without issue by the testator, *then after her decease* 80% should remain to the testator's brother; the words "*then after*" were taken to mean "*immediately after*," and consequently to restrain the dying without issue to the time of her death.

In the case of *Gawler v. Cadby (s)*, the bequest was to the testator's daughter *Emma Sarah*, and her children lawfully begotten; and in default of such issue, and in case of her death, over. Sir *Thomas Plumer*, M. R., observed that the gift to the daughter *and her children*, without the subsequent words, would have given her an absolute interest, but he was of opinion, that the words "*in default of such issue*" coupled with the words "*in case of her death*," meant "*in case of her dying without leaving*

(q) 7 T. R. 555; see *Garratt v. Cockerell*, 1 Yo. & Coll. (C.), 494.

(r) 1 P. Wms. 563; see also *Paine v. Stratton*, 2 Atk. 647; cited

and reported 3 Bro. P. C. 257; as *Stratton v. Paine*, and *Fearne*, Ex.

Div. 10th ed. 471.

(s) 1 Jacob, 346.

Bequests of
chattels, &c.

children at her death;" and that although the words were not identical with those in *Wilkinson v. South*, yet they were fairly to be interpreted as the same in substance.

In the later case of *Murray v. Addenbrooke* (t), after a previous life interest, the words "failing issue male of A." were upon the whole context, construed to mean, if there shall be no son of A. living at the death of the previous taker.

In *Barker v. Cocks* (u), the testator gave a fund (which by their marriage settlement was subject to the life interest of his wife) to A. B. and C. "equally to be divided between them;" but in case of the death of C. "without leaving lawful issue," the testator gave C.'s third to be divided equally between A. and B. The question was, to what period of time the death of C. without leaving issue related; and Lord Langdale, M. R., held that C., upon the death of the testator's wife, became absolutely entitled to one-third of the fund. His Lordship seems to have thought that the primary object of the testator was, that the three legatees should enjoy the property equally; and that by limiting the dying of C. without issue to the lifetime of the tenant for life, that intention was effectuated.

3. Where the
dying without
issue confined
to the life of
the legatee
over.

3. So where the bequest over, after failure of the issue of the first taker, is to one or more legatees for *life only*, the words "failure of issue" will be construed a dying without issue within the compass of that life. But where the entire interest is given over, the mere circumstance that one taker is confined to a life interest, furnishes no indication of an intention to make the whole bequest depend upon the existence of that person, at the time when the event happens, on which the limitation over is to take effect.

The above rule was laid down in *Barlow v. Salter* (v), which illustrates the latter portion of the rule, and wherein the testatrix gave all her real and personal estate whatsoever to her daughter for life, and in case she died without issue, all to be divided between the testatrix's four nephews and nieces (naming them), "Catherine's part only for life, and her part to be divided between the survivors." It was decided by Sir William Grant, M. R., that the devise over was too remote.

(t) 4 Russ. 407; and see *Davenport v. Bishopp*, 2 Yo. & Coll. (C.), 463.

(u) 6 Beav. 82.

(v) 17 Ves. 479; by Sir William

Grant, M. R., who cited *Roe v. Jeffery*, 7 T. R. 589; and *Pells v. Brown*, Cro. Ja. 590; See also *Fearne's Executory Dev.* sec. 14, p. 488, 10th ed.

So in the case of *Trafford v. Boehm* (*w*), which was a case of real estate, Lord *Hardwicke* observed, that if a man limits a sum of money, on failure of issue of the bodies of husband and wife, to any other person in tail, it would be void as an executory devise being too remote, as depending upon a failure of issue generally; but where the limitation over is *for life*, there it is a reasonable construction to confine it to a failure of issue during the life in being, which had been held in the case of executory devises to be a reasonable construction, if it falls within the compass of ever so many lives in being at the same time.

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chattels, &c.

4. Again, the words *leaving* or *leave* have been held sufficient to restrain the general import of the term "issue" to those living at the death of the first taker, so as to give effect to the bequests over, upon there being no such issue in existence at that period.

4. Where the words "leaving, &c." have restrained the general import of "dying without issue."

Thus, where a testator bequeathes a legacy to *A.* generally, or to *A.* for life, and in case he should die *leaving* no lawful issue, then over (*x*); or to *A.*, his executors, administrators, and assigns, and if he die before twenty-one, *leaving* no issue (*y*); or to *A.* generally, or for life, and to the heirs of his body, and if he die *leaving* no heirs of his body to *B.* (*z*); or to *A.* and his heirs, and if he die leaving no *lawful heir*, to *B.* (*a*); or to the children of *A.* living at his death, and if such children should die without *leaving* issue, to *B.* (*b*); or to *A.* for life, and to his heirs male after him, and if he should not leave any son, then over (*bb*).

But the words "for want of male issue *after him*" have not been construed to mean "living at his death," but to be too indefinite to restrain the preceding words; as, where the bequest was to *A.* and his male issue, and for want of male issue, after him to *B.* (*c*).

The Court has even considered the words "*leaving*," "*issue*,"

(*w*) 3 Atk. 449.

(*x*) *Atkinson v. Hutchinson*, 3 P. Wms. 258; *Taylor v. Clarke*, 2 Eden, 202; *Forth v. Chapman*, 1 P. Wms. 663; recognized by Lord *Hardwicke*, in *Sheffield v. Lord Orrery*, 3 Atk. 288; *Lampley v. Blower*, Ib. 396; *Stafford v. Buckley*, 2 Ves. sen. 180; see also *Southby v. Stonehouse*, Ib. 616; *Daintry v. Daintry*, 6 T. R. 307.

(*y*) *Martin v. Long*, Pre. Ch. 15.

(*z*) *Read v. Snell*, 2 Atk. 642, 646.

(*a*) *Goodtitle v. Pegden*, 2 T. R. 720.

(*b*) *Shepperd v. Lessingham*, Amb. 122; see also *Cross v. Cross*, 7 Sim. 201.

(*bb*) *Mansell v. Grove*, 2 Yo. & Coll. (C.), 484; see also *Barber v. Cocks*, 6 Beav. 82, *supra*, p. 1550.

(*c*) 7 T. R. 595.

Bequests of
chattels, &c.

&c., of different import in the same will, when applied to real and personal estate; in the first instance giving the word "*issue*" its most extensive signification, so as to create an estate tail in the devisee; and in the second, restraining the general purport of the word, so as to include only such as the first taker shall leave at his death; as the reader will find upon referring to the cases cited below (*d*).

The propriety of putting a different construction upon the word "*leaving*" in the same will has been questioned by some modern Judges (*e*); but the authority of the case of *Forth v. Chapman*, which gave rise to the above distinction, is recognised and approved of by Lord *Eldon*, C., in *Crook v. De Vandes* (*f*), and may now be considered as fully established. His Lordship says, "I have heard the case of *Forth v. Chapman* cited for years, and repeated by Lord *Kenyon* himself, as not to be shaken. I never knew it shaken (*g*).

"Leaving"
when construed
"having."

In some cases, to give consistency and effect to the will, the word "*leaving*" has been construed "*having*."

Thus in *Maitland v. Chabè* (*h*), the bequest was of 25,000*l.*, 3*l. per cent.* to trustees upon trust for *S. C.*, the testator's daughter, for life, and after her death, to transfer one moiety to his next of kin (other than the children of *S. C.*), and the other moiety unto and amongst all and every the child or children of *S. C.*, equally to be divided between them at their respective ages of twenty-one years, if more than one; and if but one, then to such one child at that age: the will contained a proviso, that in case *S. C.* should die without *leaving* any child or children, or leaving any, such child or children should die before attaining twenty-one, then the fund was to go over to the testator's next of kin, living at the death of the survivor of *S. C.* and her children, so dying before twenty-one as aforesaid. *S. C.* had only two children, *Marianne* and *Jane*: *Marianne* attained twenty-one and married, and afterwards, in 1788, died leaving one child; *Jane* also attained twenty-one and married in 1794, and died without issue, leaving her mother, *S. C.*, surviving; upon whose death, in 1821, the question arose whether the representatives of her children were

(*d*) *Forth v. Chapman*, 1 P. Wms. 664; *Sheffield v. Lord Orrery*, 3 Atk. 288; *Stafford v. Buckley*, and *Southby v. Stonehouse*, 2 Ves. sen. 180, 616; *Simmons v. Simmons*, 8 Sim. 22.

(*e*) See Lord *Kenyon*'s observations in *Roe v. Jeffery*, 7 T. R. 595,

on the distinction taken in *Forth v. Chapman*.

(*f*) 9 Ves. 203.

(*g*) See also *Radford v. Radford*, 1 Keen, 486; *Doe v. Ewart*, 7 Ad. & El. 636.

(*h*) *Mad. & Geld.* 243.

entitled to their shares, they having taken vested interests at twenty-one, or whether the next of kin of the testator were entitled to the whole fund, as neither of the daughters of *S. C.* were living at her death. Sir *J. Leach*, V. C., was of opinion that a clear vested interest was, in the first place, given to the children at twenty-one; and that if, in the clause giving the property over on failure of the children of the daughter, the word "*having*" were read for "*leaving*," the whole will would express a consistent intention to that effect; and he felt himself bound by the authorities to adopt this construction; and he considered the cases of *Woodcock v. The D. of Dorset* (i), and *Powis v. Burdett* (j), stronger than the case before him; and he decided that the daughters of *S. C.* took vested interests, having attained the age of twenty-one.

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A similar decision was made in *Casamajor v. Strode* (k), by Sir *L. Shadwell*, V. C.

5. The reader should here be apprised, that the words "*without having*" children, are not synonymous with "*without leaving*," but in some cases have been construed "*without having had* children," upon the apparent intention. The case of *Bell v. Phyn*, before stated (l), is one instance, and *Weakley ex dem. Knight v. Rugg* (m), is another.

5. But the words "*without having*" not synonymous with "*without leaving*."

In the latter, *William Owen*, having three daughters, gave the residue of a term of one thousand years to *Ann* (the wife of the lessor of the plaintiff), but if she happened to die without *having* child or children lawfully begotten, then he willed that the same premises should go to his daughter *Mary*, and after *her* to such child or children as she should happen to have lawfully begotten; and he appointed *Ann* executrix and residuary legatee. *Ann* married after the testator's death, and had three children, all of whom died in her lifetime; and the question was, whether the absolute interest in the term vested in *Ann*, or whether "*without having*" was synonymous with "*without leaving*," so as to effectuate the executory bequest to *Mary*, in case *Ann* died without *leaving* a child, which event had happened: and Lord *Kenyon* was of opinion that the term vested in *Ann*, and that the testator's primary intention was to benefit *Ann* and her progeny; and that the word "*leaving*" was essentially different from the word

(i) 3 Bro. C. C. 569.

(j) 9 Ves. 428.

(k) 8 Jur. 14.

(l) Page 617.

(m) 7 T. R. 322; see also *Malcolm v. Taylor*, 2 Russ. & M. 416.

Bequests of
chattels, &c.

“*having.*” The other Judges, *Ashurst*, *Grose*, and *Lawrence*, concurred; the latter observing, “Perhaps the general intention of the testator will be best consulted by this determination. At the same time, I confess it struck me at first, that this was a gift to *Ann*, and in case she left any children, that she should have the power of disposing of it absolutely, the testator taking it for granted that she would provide for those children; but if she *left* no child, then the estate should go to *Mary* and her children. That is the grammatical construction of the will; *having* refers to the time of the death; whereas, according to the plaintiff’s argument, that word must be read, “*having had*” (n).

In *Stone v. Maule* (o), the bequest was to *H. D.* for his own use and benefit; and in case he should die in the testator’s lifetime, or afterwards, *without having* any child or children, then over. *H. D.* died after the testator unmarried. He was illegitimate, and on behalf of the Crown, it was argued that the above words were to be taken as synonymous with the expression “without issue.” Sir *L. Shadwell*, V. C., rejected this construction, deciding, that in the event which had happened the bequest over took effect. The preceding case of *Weakley v. Rugg* (p), was not adverted to in the last case, but was in point.

In *Parr v. Parr* (pp), the testator directed a fund to be settled upon his daughter for life, in such manner, that in case of her death it should devolve upon her children, *if she should have any*; and if she *should not have any*, then that she should bequeath it to any person she might think fit. Sir *John Leach*, M. R., decided that the meaning of the testator was, if the daughter had no child living at her death; and that the representatives of a deceased child, who died in the lifetime of the testator’s daughter, were not entitled.

6. Where the word *issue* applies to preceding words of narrower import.

6. Where the words “dying without issue” apply to preceding words of narrower signification, as to a descript class of descendants, who must take within a legal period, the general import of dying without issue will be restrained accordingly.

Thus, where the bequest is to *A.* for life, and afterwards to his children, or sons, payable at twenty-one, or marriage, and in

(n) See also *Pinbury v. Elkin*, 1 P. Wms. 563, for the different meaning of the words, “dying without issue;” *Target v. Gaunt*, 1 P. Wms. 432.

(o) 2 Sim. 490.

(p) Ib. 7 T. R. 322.

(pp) 1 Myl. & K. 647; see also *Stonor v. Curwen*, 5 Sim. 264, *supra*, p. 96.

default of such issue, to *B.*; in such case, the generality of the words "*in default of such issue*," has been governed and controlled by the preceding expressions, "*children or sons*;" the Court considering the words to mean, not an indefinite failure of the issue of *A.* but the failure of such children, or sons only, as were previously described (*q*).

Bequests of
chattels, &c.

7. Again, the natural import of the words "*without issue*," has been restrained, when the bequest to the issue is coupled with a power of appointment.

7. Dying
without issue
restrained
when coupled
with a power
of appointment.

Thus, in *Target v. Gaunt* (*r*), the testator bequeathed the residue of a term of years to his son *Henry* for life, and after his decease, to such of the issue of *Henry* as *Henry* should by his will appoint; and in case he should die without issue, then the testator devised the same to *Albinus*. *Henry* died without issue living at his death; and it was determined by Lord *Parker*, C., that the limitation to *Albinus* was good; and, as it should seem, upon the ground, that the power of appointment among his issue reserved to *Henry*, manifested the intention of the testator in using the word "*issue*," that he included none else but such issue of *Henry* as he might appoint to, viz., such as should be living at his death.

The case of *Keily v. Fowler* (*s*), was determined upon the same principle. There the testator bequeathed to his daughter all his personal estate, provided that she married with the consent of his executors therein named; and, after appointing *A.* and *B.* executors, he declared, that if his daughter should die without issue, all his said substance should *return to his executors, to be distributed* as he should thereafter direct; and lastly, if his daughter married without consent, *or should die without issue*, he directed that his said substance should *return to his executors; to be by them distributed* in the following manner: to *C.*, 100*l.*; to *D.*, 50*l.*, and to each of his executors, 50*l.*, &c. The question was, whether the bequests expectant on the death and failure

(*q*) *Pleydell v. Pleydell*, 1 P. Wms. 748; and Lord *Hardwicke's* comment, Amb. 126; *Maddox v. Staines*, 2 P. Wms. 421, aff. D. P.; 3 Bro. P. C. 108; see also *Tucker v. Harris*, 5 Sim. 538; *Bradshaw v. Skilbeck*, 2 Bing. N. S. 182; *Malcolm v. Taylor*, 2 Russ. & M. 416, 421; *Trickey v. Trickey*, 3 Myl. & K. 560; and see *Ellicombe v. Gompertz*, 3 Myl. & Cr. 127; *Walker v. Petchell*, 1 Com. Bench

R. 652, cases of real estate; *Leeming v. Sherratt*, 2 Hare, 14; *Minter v. Wraith*, 13 Sim. 52.

(*r*) 1 P. Wms. 432; but it should seem that a similar limitation in real estate would have received a different construction; *Jesson v. Wright*, 2 Bligh. 1.

(*s*) 6 Bro. P. C. 309; see also *Balguy v. Hamilton*, Mose. 186.

Requests of
chattels, &c.

Dying without
issue restrained.

of issue of the testator's daughter were valid? and it was determined in the affirmative; the general expressions, "dying without issue," being in this case to be confined to the period of the daughter's death. The principle of the decision appears to have been this; that the fund being directed to revert to the testator's executors, to be *by them* distributed, &c., upon the daughter's death without issue, manifested an intention in the testator to repose a *personal* trust and confidence in them; but, as such trust and confidence could never have been exercised, if the daughter's death without issue were construed an *indefinite* failure of issue, the generality of the words was, in order to effectuate the intention, restrained to the failure of issue living at her death.

SECT. VI. Bequests of personalty upon trusts for *accumulation.*

Upon trust for
accumulation.

Previously to the statute of the 40th Geo. 3, c. 98, dispositions of real and personal estate, by which the profits and produce were directed to accumulate, were equally valid as other dispositions restricting the mode of enjoyment, provided the period of accumulation did not exceed the limit prescribed by law for fettering the powers of absolute ownership, namely, a life or lives in being, and twenty-one years afterwards, with the further period of a few months for gestation. This will appear from the arguments and judgments in the celebrated case of *Thellusson v. Woodford* (t), which gave occasion to the above mentioned act. Any consideration of this case would here be unnecessary; and the reader is referred to Mr. *Hargrave's* learned arguments in that case, and particularly his second, wherein he traces, with his usual ability, the rise and progress of executory devise in this country. The arguments will be found in the valuable collection of that learned author, which he calls his *Jurisconsult Exercitationes* (u).

By the above act, all dispositions of real and personal estate, by which the profits and produce thereof are directed to *accumulate*, and the beneficial enjoyment postponed, are declared to be subject to the following restrictions; namely, that no person should thenceforth, by will or any other instrument, dispose of or settle any real or personal property, in such manner, that the

(t) 4 Ves. 227; 11 Ib. 112, and
1 New Rep. 357.

(u) 2 Vol. p. 27.

rents or produce of the same shall be wholly or partially accumulated for a longer period than—*first*, the life of the grantor or settlor; or, *secondly*, the term of twenty-one years from the death of the grantor, settlor, deviser, or testator (*v*); or, *thirdly*, during the minority of the person, who shall be living, or *in ventre sa mere*, at the death of such grantor, settlor, deviser, or testator (*w*); or, *fourthly*, during the minority of the person who, under the uses or trusts of the instrument directing such accumulations, would, if of full age, be entitled to the rents or produce directed to accumulate (*x*). The act declared, that every direction for an accumulation, not corresponding with the above restrictions, should be void, and the rents and produce of the property should be received by the person who would have been entitled thereto, if such accumulation had not been directed. There are three exceptions provided by the act (*y*): first, provisions for payment of the debts of the grantor, settlor, deviser, or testator, or the payment of the debts of any other persons; secondly, provisions for raising portions for any child or children of any grantor, &c., or of any person taking any interest under any such conveyance, &c.; and, thirdly, provisions or directions concerning the produce of timber or wood (*z*).

Bequests of
chattels, &c.

Upon trust for
accumulation.

In the construction of this act the following distinction has been established; namely, that where a trust for accumulation, which, prior to the above act, (called Lord *Loughborough's* Act), would have been good, as within the prescribed period of executory devise, so much thereof as is now within the limit of the act will be good; but the excess only will be bad; while, on the other hand, where there is a trust for accumulation, and part of it would have been bad before the act, that part remains bad notwithstanding the act (*a*).

1. We *first* advert to the cases of accumulation void only for the *excess*.

1. Where void
only for the
excess.

(*v*) As in *Bengough v. Edridge*, 1 Sim. 173; 1 Cl. & Fin. 372; *Lewes v. Lewes*, 6 Sim. 304; *Scott v. Earl of Scarborough*, 1 Beav. 154.

Haley v. Bannister, 4 Mad. 275; *Ellis v. Maxwell*, Lewin on Trusts, p. 714.

(*y*) Section 2.

(*w*) As in *Johnson v. Johnson*, 1 Keen, 648; *Harrison v. Harrison*, id. 765; *Hulme v. Hulme*, 9 Sim. 644; *Easum v. Appleford*, 10 Ib. 274.

(*z*) Mr. Preston's observations on the act in his note in Mr. Butler's ed. of *Fearne Cont. Remr.* p. 538, will be read with advantage.

(*x*) In reference to the construction of this clause of the act, see

(*a*) See per Lord *Eldon*, *Marshall v. Holloway*, 2 Swanst. 450.

Bequests of
chattels, &c.

Upon trust for
accumulation.

The former part of this proposition is proved by the case of *Griffiths v. Vere* (b). There the testatrix gave all her real and personal estate to trustees, in trust to sell, and after payment of her debts, to invest the produce in the public funds, and pay the dividends to her sisters, *Elizabeth Mary Griffiths* and *Martha Vere*, during their joint lives, in equal proportions, and to the survivor; and provided that so much of the dividends as should accrue to *Elizabeth Mary Griffiths*, in the life of her husband, *John*, should not, during that period, be paid to her or for her use, but should, *during his life*, be invested by the trustees in the public funds, and upon the death of *John Griffiths*, the capital, with the *accumulations*, should be transferred and paid to *Elizabeth*, but if then dead, to sink into the residue of her personal estate; which, after the death of her said sisters, the testatrix gave in trust for the children of her sister, *M. A. Stuart*. It was insisted, that the clause in the will directing accumulation during the life of *John Griffiths* was void, and consequently that the plaintiff, *E. M. Griffiths*, was immediately entitled thereto. The question being, whether the trust for accumulation was void *in toto*, or only for the *excess*? Lord *Eldon*, after remarking that the alterations which had been made in the act in its progress had rendered it in some degree inaccurate, decided that the trust was good for twenty-one years. His Lordship upon this occasion consulted those who were concerned in framing the act, and declared that he had found no difference of judicial opinion upon the subject.

The last case was followed by *Longdon v. Simson* (c), in which the bequest was of the profits of certain canal and waterwork shares to be invested in the public funds of this country and *America*, the interest arising thence to be applied to the education of the children of *Mary Ann Williams* and *Robert Williams*, the testator's nephew and niece, in equal shares; and on their attaining the age of twenty-one years, the whole to be divided equally among them. *Mary Ann Williams* married *John Longdon*. At the time of the filing of the bill and decree there was no issue of the marriage living, and *Robert Williams* was unmarried. The objection was, that the accumulation went further than the act allowed; that it must last, according to the will, during twenty-one years from the birth of a child. But Sir *William Grant*, M. R., decided, that the trust was good for twenty-one years; observing, that if, instead of a life, the testator

(b) 9 Ves. 127.

(c) 12 Ves. 295.

had said the accumulation should continue twenty-four years, that would be good for twenty-one years.

Bequests of
chattels, &c.

Upon trusts for
accumulation.

Again, in *Haley v. Bannister* (d), *R. Bannister*, by a codicil, directed that two sums of 6,000*l.* stock should be purchased in the names of his executors, and that the dividends should be invested so as to accumulate until one of the children of his daughter, *Amelia Haley*, should attain twenty-one; and then the whole to be transferred to such child, if but one should attain that age, and if more, among them equally. It was insisted, that the accumulation, so far as respected children then living, was good, but was contrary to the late statute, so far as it gave the accumulations to a child at present unborn, on attaining twenty-one, in case of the deaths of all the present children; in answer to which, Sir *John Leach*, V. C., observed, "The statute prevents an accumulation of interest during the minority of an unborn child, but as to the principal, the law remains as before the statute. The excess of accumulation prohibited by the statute would form part of the residue."

In *Shaw v. Rhodes* (e), a testator devised real estates to trustees upon trust, after payment of certain annuities to his children, to accumulate the surplus rents, until the youngest of his grandchildren, &c., then or thereafter to be born, should attain the age of twenty-one years; and at that period to divide the accumulated fund among his grandchildren who should then be living; and he directed, if at that period any of his children should be living, a further accumulation should be made until the death of his last surviving child; and that such further accumulation should be divided among his grandchildren then living: and, charged as aforesaid, the testator directed that after the death of the survivor of his children, the whole of his estates should be charged for twenty years with the payment of two-thirds of the clear produce of his estates in equal proportions, of so much money as would, in fifteen years, make in the whole 30,000*l.*, which sum, with the interest, he directed should be divided equally among his grandchildren, who should attain the age of twenty-one. The testator died in 1812 leaving ten grandchildren, of whom nine were the children of one of the annuitants, and the tenth, the child of a

(d) 4 *Mad.* 275; see also *Crawley v. Crawley*, 7 *Sim.* 427; *Miles v. Dyer*, 8 *Ib.* 380; *Bleas v. Burgh*, 2 *Beav.* 221; *Williams v. Nixon*, *Ib.* 472; *Webb v. Webb*, *Ib.* 493; *Ellis v. Maxwell*, 3 *Ib.* 587; *Attorney*

General v. Pouldon, 3 *Hare*, 555.

(e) 1 *Myl. & Cr.* 135; see also *M'Donald v. Bryce*, 2 *Keen*, 276, *infra*, p. 1561; *Trickey v. Trickey*, 3 *Myl. & K.* 560; *O'Neil v. Lucas*, 2 *Keen*, 313.

Bequests of
chattels, &c.

Upon trusts for
accumulation.

Heir or next of
kin entitled to
surplus income
when accumu-
lation directed
beyond the
legal period.

son, who was dead when the will was made. The youngest of the grandchildren attained the age of twenty-one in 1831. Lord *Brougham*, C., directed a case to be sent to law; but, that being found impracticable, an appeal was heard before Lords Commissioners *Pepys* and *Bosanquet*, who decided that the charge of two-thirds for twenty years, was a provision for accumulation within the 39 & 40 Geo. 3, c. 98, and was necessarily connected with the two prior trusts for accumulation, which determined in 1831; and, therefore, that it was effectual for two years only, and void for the remaining eighteen years, that being the period by which, when superadded to the duration of the preceding trusts, it exceeded the limits within which accumulation was allowed.

Devises and bequests of residuary property, where there is an express direction to accumulate the income beyond the limit prescribed by the above statute, give rise to the further inquiry, to whom belongs the intermediate income, accruing between the termination of the prescribed period and the vesting of the ulterior executory devise or bequest; and it is now settled, that such intermediate income, including that of the lawful accumulations, devolves in the case of real estate upon the heir, and of personalty upon the next of kin.

This was decided in the cases of *Eyre v. Marsden* (f), and *Elborne v. Goode* (g).

Eyre v. Marsden is in many circumstances similar to *Shaw v. Rhodes*, and it was decided by Lord *Langdale*, M. R., in the former case, that the void accumulations which proceeded from the residuary personal estate belonged to the next of kin, and not to the residuary legatees; and that those which proceeded from the residuary real estate belonged to the heir-at-law. His Lordship observed, that the above act, which restricted the accumulation of property, did not operate to alter any disposition in a will except only the direction to accumulate; striking that direction out, everything else was left as before; and all the other directions of the will as to the time of payment, the substitution of interest, or any contingencies, take effect unaltered by the statute.

In *Elborne v. Goode*, the testator gave the residue of his personal estate to trustees in trust to invest it; and, subject to the payment of certain annuities to his sisters and nine nephews and nieces, directed that the income should accumulate until the decease of the surviving annuitant. He then, after giving certain legacies, bequeathed the residue of his trust-mones and effects

(f) 2 Keen, 564; 4 Myl. & Cr. 231.

(g) 14 Sim. 165.

Wright v. Buck 12 Jurist 771 as to cert. of suit.

among the children of his said nine nephews and nieces (who were the annuitants therein named), and of *E. G.*, who should be living at the death of the survivor of the said annuitants equally. The testator died in 1815; and some of the annuitants being alive, and the surplus income of testator's property having been accumulated beyond the period allowed by the act (39 & 40 Geo. 3, c. 98), the question was, whether the excess of the accumulation formed part of the residue, or belonged to the next of kin of the testator. Sir *L. Shadwell*, V. C., after expressing his opinion, that the decision in *Macdonald v. Bryce* (*h*) next stated could not be sustained, observed, that the case before him was nothing more than the ordinary one of a person making an executory gift to take effect after the deaths of some persons, and directing that, during their lives, there should be an accumulation, and that then the law was clear; and the statute cutting down the period of accumulation to twenty-one years, according to its language, as expounded by a great variety of decisions, he must hold, that the accumulations beyond the period of twenty-one years, belonged to those who were the next of kin of the testator at his death.

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Upon trust for
accumulation.

But where there is no express direction to accumulate, but the accumulation is left to the operation of law, there the intermediate income will belong to the persons ultimately taking under the executory devise or bequest. This principle was laid down by Sir *L. Shadwell*, V. C., in *Elborne v. Goode*, but that case being one of express direction to accumulate, fell within the former class.

Secus, where no
accumulation
directed.

The case of *Macdonald v. Bryce*, it is conceived, in accordance with the opinion of Sir *L. Shadwell*, would have fallen within the principle now under consideration, but it was otherwise determined by Lord *Langdale*. In that case, decided by his Lordship previously to *Eyre v. Marsden*, the testator gave the residue of his property to *R.*, the eldest son of *P.*, and failing him, to the next and other sons of *P.* in succession; and failing the male heirs of *P.*, to the residuary legatees: the testator directed the executors to apply the dividends of the residue for the maintenance of *R.* during minority, and to the other sons in succession of *P.*, in case of the death of *R.* under twenty-one. *R.* surviving the testator, died an infant; *P.* who was advanced in years had no other son. Lord *Langdale*, M. R., held, that the next of kin, and not the residuary legatees, were entitled to the income of the

(*h*) 2 Keen, 276.

Bequests of
chattels, &c.

Upon trust for
accumulation.

residue, until the contingency upon which the residue was given, either to a male child of *P.*, or to the residuary legatees, should be determined. The ground of his Lordship's judgment seems to have been, that the gift over to the residuary legatees was contingent, and that there was an *implied trust for accumulation*; and that the income of the residue, and its lawful accumulations, were not given by the will at all, if not given by the residuary clause; and if given by the residuary clause, the bequest of the income was void by the statute; and so, being a part of the residue undisposed of, belonged to the next of kin.

The last case is clearly distinguishable from *Eyre v. Marsden* and *Elborne v. Goode*, in each of which there was an express direction to accumulate; but in *Macdonald v. Bryce* there was none; the testator merely directed maintenance, and the statute as observed by Lord *Eldon* in *Griffiths v. Vere* (i), and, as it would seem, admitted by Lord *Langdale* himself in *Eyre v. Marsden*, would not interfere with any accumulation which would take place by operation of law: and it is submitted, that upon the death of the infant *R.*, in *Macdonald v. Bryce*, the residue vested in the residuary legatees under the residuary bequest, subject to be divested on the birth of another son of *P.*; and that, consequently, the intermediate income of the residue and of the lawful accumulations devolved, with the *corpus* of the residue, upon the residuary legatees, to the exclusion of the next of kin (j).

The case of *The Corporation of Bridgnorth v. Collins* (k) would seem to fall within the class of authorities under review.

There the testator bequeathed the sum of 3,300*l.* to the Corporation and their successors, upon trust to invest, and pay the income of 2,000*l.* part thereof to *A.* for life; and after her death, upon the trusts after mentioned, and to pay the income of other parts of the 3,300*l.* to several annuitants: and after the death of the survivor of the annuitants, to sell the securities upon which the fund was invested, and pay the money arising therefrom, with the proceeds which should have accumulated in respect thereof, among such of the testator's second cousins as should be living at the death of the surviving annuitant. The residue was given to *B.* The testator died in 1812, and the surviving annuitant in 1835. *B.* contended that he was entitled to the overplus accu-

(i) 9 Ves. 127.

(j) See *Stephens v. Stephens*, Ca.

Tem. Tal. 228, and *Rogers v. Gibson*,
Ambl. 93.

(k) 11 Jur. 213.

mulations beyond the lawful period, under the *Thellusson* Act, but Sir *L. Shadwell*, V. C., held, that as there was no specific direction in the will for accumulation, that statute did not apply; and that any accumulation which might happen was a mere contingency, and not a devise of the testator's, though there was a direction by the testator to dispose of what might be accumulated. The result of his Honor's decision, it is presumed (but not stated in the report), that the accumulations passed with the *corpus* of the fund to the second cousins.

Bequests of
chattels, &c.

Upon trust for
accumulation.

2. Where the trust for accumulation is void *in toto*.

The latter part of the distinction adverted to at the commencement of the present section (*k*), is exemplified in the case of *Lord Southampton v. Marquis of Hertford* (*l*), in which the trusts of a term of one thousand years created by settlement were, that during the minority or respective minorities of any tenant for life or tenant in tail in possession, the trustees should, after applying a competent part of the rents, &c., in discharge of existing incumbrances, apply the residue, during such minority, in the purchase of public stock, from time to time to accumulate; and stand possessed thereof with the accumulations, in trust for such person or persons as should, after such minority or respective minorities, or the death or respective deaths of such minors, be tenant or tenants in possession, and of the age of twenty-one years. Sir *William Grant* observed, that an estate could not be limited, so as to vest only in the first descendant of a person in being, who might attain twenty-one; as that descendant might be a child of an unborn child, or a person more remote, and the period therefore much beyond the limits. That it was an attempt wholly to sever the surplus rents and profits from the legal ownership of the estate for a time, that might extend much beyond the period allowed for executory devise or trusts for accumulation, and to give them to a person who might not come into existence until after that period. His Honor decided, that the trust was altogether void, except so far as it is a trust for the payment of debts (*m*).

2. Where void
in toto.

We shall conclude the present section, with noticing the case of *Marshall v. Holloway* (*n*), which, so far as respects the trusts

(*k*) *Supra*, p. 1557.

(*l*) 2 Ves. & Bea. 54; see also

Marshall v. Holloway, 2 Swan. 432.

(*m*) And see *Leake v. Robinson*, 2

Mer. 363; and *Ware v. Polhill*, 11 Ves. 257.

(*n*) 2 Swans. 432.

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chattels, &c.

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for accumulation, is not to be distinguished from the preceding case of *Lord Southampton v. Marquis of Hertford*. In the former case, the testator devised and bequeathed his real and personal estate, upon trust to convert his personal estate into money, and after payment of his debts and legacies, to lay out and invest the clear surplus in the public funds or securities, and to lay out the produce thereof, and also the rents and produce of his real estate, from time to time when and so often as any person or persons beneficially interested in or entitled to any real and personal estates under the trusts of the will, should be under the age of twenty-one years, adding such investments to the personal estate in order to accumulate the same. Lord *Eldon*, C., decided, that the trust for accumulation was void *in toto*; and observed, that it was very difficult to distinguish this case from *Lord Southampton v. Marquis of Hertford*; and then his Lordship stated, in effect, the distinction before given, and concluded with observing, "The case of *Lord Southampton v. Marquis of Hertford* seems to have decided that if property is given, subject to a trust which is bad, the gift of the property takes effect exempt from the trust. The trust for accumulation in this case I think bad, because it may last for ages."

For other instances in which the accumulations directed by the testator have been held void *in toto*, the reader is referred to the authorities cited below (o).

It may be here observed that a trust to accumulate, which before the statute was totally void, still remains so since the statute (p).

In the cases cited in the note (p), will be found instances in which the accumulations directed were held good, the statute not applying to them.

(o) *Palmer v. Holford*, 4 Russ. 403; *Vawdry v. Geddes*, 1 Russ. & M. 203; *Porter v. Fox*, 6 Sim. 485; *Blease v. Burgh*, 2 Beav. 221; *Griffith v. Blunt*, 4 Ib. 248; *Curtis v. Lukin*, 5 Ib. 147; *Boughton v. James*, 1 Coll. (C.), 26: *Browne v. Stoughton*, 14 Sim. 369.
(p) *Boughton v. James*, *ubi supra*.
(q) *Lombe v. Stoughton*, 12 Sim. 304; *Routh v. Hutchinson*, 8 Beav. 581.

CHAPTER XXIII.

Of Election.

SECT. I. The general doctrine stated and illustrated.

SECT. II. Its requisites.

To impose the obligation to elect.

1.—*Intention of the testator to dispose of the property in question, must be clear.*

2.—*Intention of the testator that the person entitled to the property in question should elect.*

To the performance of that obligation ;

3.—*That the property be ascertained.*

To the validity of the election when made ;

4.—*A knowledge of right in the party electing.*

SECT. III. Its application.

First.—*To the heir at common law ; and,*

1.—*Where the will is invalid, for want of due execution.*

2. ————— *for want of ability to devise, either by reason of infancy or by reason of coverture.*

3. ————— *for want of due execution, but an express condition is imposed on the legatee to comply with the will.*

4. *Where the will was duly executed, but was void as a devise to the heir of a testator dying before the 1st of January, 1834.*

Secondly.—*To the heir by custom.*

1.—*Where no previous surrender having been made, the will contains a specific devise of the copyhold.*

2.—*Where no previous surrender, and the devise in general terms.*

First.—*Where the testator has no other real estate than copyhold to which the general description can apply.*

Secondly.—*Where he has both freehold and copyhold.*

1.—*Where the question of election is between the customary heir and volunteers, such as the wife and children of the testator.*

2.—*Where between the customary heir and the creditors of the testator.*

Thirdly.—*To the heir of heritable property in Scotland.*

Fourthly.—*To the widow of the testator ; and herein of the 3 & 4 Wm. 4, c. 105, s. 9.*

1.—*Where, irrespectively of the above act, the intention to exclude her is not sufficiently apparent on the will ; and that, notwithstanding the land subject to dower, or an annuity charged upon the land, is devised to the wife.*

2.—*Where the intention to exclude her has been considered apparent.*

3.—*Where the testamentary benefit is expressly given in lieu of dower, or the widow claims as next of kin of the testator.*

Fifthly.—*To married women.*

Sixthly.—*To infants.*

Seventhly.—*To creditors.*

Eighthly.—*To persons taking in succession.*

Ninthly.—*As between residuary and particular legatees.*

Tenthly.—*To widow and children taking by the custom of London.*

SECT. IV. Of *mistake* or misconception of right in the person electing.

SECT. V. Of *acquiescence*.

SECT. VI. Of the *effect or consequences* of election.

Doctrine stated
and exempli-
fied.

SECT. I. The general doctrine stated and illustrated.

The doctrine of election (a) is founded upon the principle, that

(a) As to the origin of election, see 19 Ves. 663 ; 1 Swan. 396, note.

a person shall not be permitted to claim under any instrument, whether it be a deed (*b*) or will, without giving full effect to it, in every respect, so far as such person is concerned. This doctrine is called into exercise when a testator gives what does not belong to him, but to some other person, and gives to that person some estate of his own; by virtue of which gift a condition is implied, either that he shall part with his own estate, or shall not take the bounty (*c*). In such a case, equity will not allow the first legatee to insist upon that, by which he would deprive another legatee under the same will of the benefit to which he would be entitled, if the first legatee permitted the whole will to operate, and therefore compels him to make his election between his right independent of the will, and the benefit under it. This principle of equity does not give the disappointed legatee a right to retain the thing itself, but gives a right to compensation out of something itself.

General doctrine illustrated.

If, for example, a testator undertake to dispose of an estate belonging to *B.*, and devise to *B.* other lands, or bequeath to him a considerable legacy by the same will, *B.* will not be permitted to keep his own estate, and enjoy at the same time the benefit of the devise or bequest made in his favour, but must elect whether he will part with his own estate, and accept the provisions in the will, or continue in possession of the former and reject the latter. Or, again, if a person, having a power of appointment among certain objects, by will appoints the fund among other objects, giving, at the same time, legacies to the proper objects of the power; the latter, if they object to the invalidity of the appointment, will be put to their election (*d*).

The subsequent cases fully establish and illustrate the doctrine as above stated.

The first case we shall cite is *Noys v. Mordaunt* (*e*); *John Everard* devised certain lands in *Beeston* (which on his marriage had been settled on himself for life, upon his wife for her jointure, with remainder to the first and other sons of the marriage in tail, with remainder to the heirs of his body) to *Margaret* his eldest daughter, and 800*l.* in money; to *Mary* his second daughter, his lands in *Stanhorn* and *Broom*, and 1,300*l.* on condition she released *Beeston* lands to her sister *Margaret*: pro-

(*b*) 2 Scho. & Lef. 266; and see *Seton v. Smith*, 11 Sim. 59; and *M'Donald v. M'Donald*, 2 Con. & L. 481, 483.

(*c*) 9 Ves. 515; 10 Ib. 609; 13 Ib. 220.

(*d*) *Welby v. Welby*, 2 Ves. & Bea. 187.

(*e*) 2 Vern. 581.

General doctrine illustrated.

viding that, if he had a son, what was devised to his daughters should be void: but if he should have another daughter, then he gave the 800*l.* bequeathed to *Margaret* to such after-born daughter; and the lands at *Stanhorn* and *Broom*, and the 1,300*l.* he had given to *Mary*, to the said *Mary* and his after-born daughter equally. The testator died leaving his wife *enceinte* with a daughter *Elizabeth*: *Mary* died without issue, and without having given any release to her sister *Margaret*, according to his will. *Elizabeth* claimed not only the lands of *Stanhorn* and *Broom* devised to her by the will, and a moiety of what was devised to *Mary*, but also a moiety of the *Beeston* lands, comprised in the settlement, which the testator had devised to *Margaret*. Upon the question, whether *Elizabeth* should elect between the provisions by the will and the settlement, Lord Keeper *Cowper* decided in the affirmative, observing, that where a man was disposing of his estate among his children, and gave to one fee simple lands, and to another lands entailed or under settlement, it was upon an implied condition that each party acquitted and released the other; especially where the testator had given more to *Elizabeth* than what belonged to her by the settlement.

Again, in *Streatfield v. Streatfield* (*f*), *Thomas Streatfield*, the plaintiff's grandfather, by articles on his marriage, in 1677, agreed to settle lands in *Sevenoake* to the use of himself and *Martha*, his intended wife, for their lives and the life of the survivor, with remainder to the use of the heirs of his body on his wife begotten, with remainders over. The marriage took effect, and by deed in 1698, reciting the articles, he settled the lands in *Sevenoake* in such a manner as was not an equitable performance of the articles. There were issue of the marriage, *Thomas* an only son, and two daughters, *Margaret* and *Martha*. Upon the marriage of *Thomas* the son, in 1716, the father settled other lands, of which he was seised in fee, of the yearly value of 355*l.* to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to *Thomas* (the son), with a power to raise 2,000*l.* for younger children. After the son's death, *Thomas* the father, in 1723, levied a fine of the lands, comprised in the settlement of 1698, to the use of himself in fee; and in the year 1725 made his will, thereby devising part of those lands to his two daughters, *Margaret* and *Martha*; "and also all others his manors, messuages, &c. whatsoever, in pos-

(*f*) Forr. 176; 1 Swan. 436, 447.

session, reversion, or remainder, not thereinbefore disposed of, situate in the counties of *Kent*, *Surrey* or elsewhere, to trustees, in trust for his grandson *Thomas*, the plaintiff, for life; with remainder to his first and other sons in tail male; remainder to *Margaret* and *Martha*, with several remainders over." The testator added a clause, authorizing his trustees, out of the rents and profits of the estates devised to them, to appropriate what they should think proper for the education of his grandson *Thomas*, and lay out the nett surplus at interest, and pay the said monies and interest to his grandson at twenty-one, or if he died under that age, to the testator's daughters, *Margaret* and *Martha*, their executors, &c. The testator died in 1730; and the question was, whether the general devise to the plaintiff was sufficient to compel him to elect between it and his interest under the articles. Lord *Talbot*, C., was clearly of opinion, that *Thomas*, the grandfather, by the fine, intended to acquire the absolute ownership of the lands at *Sevenoake*; and by his will, conceiving he had the power, clearly intended to dispose of them, and not merely to devise his reversion under the articles; that, under the general words of the devise to the trustees, the other part of the lands passed, of which, indeed, though impressed with a trust in equity, the testator had legally a power to dispose: and that the testator must have conceived himself entitled as much to one part of those lands as the other. His Lordship said, that if the plaintiff had a lien upon the land of the articles, he might stand to them if he pleased; but when a man takes upon him to devise what he had no power over, upon a supposition his will would be acquiesced in, the Court compels the devisee, if he would take advantage of the will, to take entirely, but not partially, under it (g); there being a tacit condition, that the devisee should not disturb the devise. The difficulty in the present case was, that what was given to the devisee was precarious, nothing being given to him till twenty-one, and then only a life estate; and that the devisee was also heir; but his Lordship did not consider these circumstances as altering the case; and that it was equally in the power of the Court to make the limited devise a satisfaction, if the party stood to the will. His Lordship further thought, that what was devised to the plaintiff was not to be looked upon as intended by the testator to go towards the maintenance of younger chil-

General doctrine illustrated.

(g) As in *Noys v. Mordaunt*, *Kingsly*, 1 Ves. sen. 238. *supra*, p. 1567; see also *Roberts v.*

General doctrine illustrated.

dren: and he decreed that the plaintiff should have six months after he came of age to make his election; and if he stood to the articles, a sufficient part of the rents of the lands devised to him accruing during his life, should be invested in the purchase of freehold estates, of which so much as amounted to the value of the lands, comprised in the articles and settlement, and which were devised to *Margaret* and *Martha*, were to be conveyed to them in fee, and the surplus to the trustees upon the trusts of the will.

In *Sir Robert Walpole v. Lord Conway* (h), by articles entered into on the marriage of *Francis* Lord *Conway* with Lady *Mary Hide*, in 1703, it was agreed, 5,000*l.*, the half of her fortune, being paid down, that the other half should be paid to the trustees, with interest, within one year after the marriage; to be laid out in lands to be settled to the use of *Francis* for life; remainder to Lady *Mary* for life; remainder in trust for such children, and in such proportions, &c. as *Francis* should appoint; and in default of appointment, to the use of all the daughters and younger sons, and the heirs of their bodies; and if only one son, to him in tail; with remainder to *Francis* in fee. There were issue of the marriage four daughters, *Lettice*, *Mary*, *Harriet* and *Catherine*. *Lettice* died in her father's lifetime, unmarried; upon which he made two leases of certain lands for forty-one years, in trust to raise portions for the surviving daughters payable at seventeen, upon condition that, if they married without his consent, the benefit of the portions was to cease: those deeds were subject to a power of revocation. *Mary* afterwards married without her father's consent. Lady *Conway* being dead, Lord *Francis* married a second wife, by whom he had two sons; the eldest, afterwards Lord *Conway* and *Henry*. Lord *Conway*, the father, by will gave 6,000*l.* to *Harriet*; after which followed a clause with this recital: "Whereas I did demise certain lands to trustees for forty-one years, to hold at their ancient rent, by way of provision for younger children; and whereas there would be great arrears in the hands of the trustees, arising from the profits of those leases; and whereas there is due to me 5,000*l.* on account of my first wife, so that my personal estate will be sufficient to pay my debts and legacies; yet, lest it should not," the testator then devised certain lands to *Sir Robert Walpole*, in trust to supply the deficiency of his personal estate; and the residue of that personal estate he gave

(h) Barnard. Ch. Rep. 153.

to *Henry*. He also gave 5,000*l.* to *Mary*, and 5,000*l.* to *Catherine*. By a subsequent codicil, he bequeathed to *Mary* 5*l.* in full of all benefit of his estate. *Catherine* died, and *Harriet* was her administratrix. The question was, whether *Harriet* was obliged to elect between the provisions in the will of her father, to which she was entitled in her own right, and as administratrix of *Catherine*, and her share of the 5,000*l.* agreed to be laid out in lands by her father's marriage articles, and which had not been so applied? Lord *Hardwicke* decided that she must elect; being of opinion, that the testator in mistake considered the 5,000*l.* as part of his own personal estate, out of which *Harriet* was to have satisfaction of her legacy, therefore she could not claim the 6,000*l.* and her interest in the 5,000*l.* likewise: and that the testator's mistake was no more objection in that case, than the similar circumstance in *Noys v. Mordaunt* (i).

General doctrine illustrated.

Again in *Kirkham v. Smith* (k), *Hugh Smith*, having by the death of his two brothers become tenant in tail under the will of his father *Erasmus*, paid off 5,800*l.*, a debt secured upon the estate by a mortgage for a term of years, but he did not take any assignment of the term to himself. Conceiving himself to be owner, and to have power to dispose of the estate, by deed in 1741, in consideration of natural affection for his two daughters and his wife, he settled the whole of his real estate, including and describing the estate in question, upon his two daughters and their issue; with remainder to the same collateral branches as under his father's entail. He also made a will of even date with the deed of settlement, and attested by the same witnesses, wherein he referred to the settlement, and gave legacies to the plaintiffs, with a direction that his wife should live in his mansion house at *Weald Hall, Essex*, with his daughters, and have the use of the furniture, which should be further enjoyed by the persons having the mansion house, as limited by the settlement. The testator died in 1744, leaving his wife and two daughters, the plaintiffs; who, as not being barred, claimed the estate under the remainder in the will of *Erasmus*, discharged from the mortgage debt, there being a strong presumption that it was not paid out of *Hugh Smith's* own money, but out of the assets of *Erasmus*, there being a direct representation of executors. The question was, whether the plaintiffs should elect between the provisions in the will of *Hugh Smith*, and the will of *Erasmus*;

(i) *Supra*, p. 1567.

(k) 1 Ves. sen. 258; see *Giddings v. Giddings*, 3 Russ. 241.

General doctrine illustrated.

and Lord *Hardwicke* determined that they should elect. His Lordship was of opinion, that the settlement and will were to be taken as one entire disposition, the latter being a continuance of the intent of the former; and that it could not be presumed that the mortgage was paid out of the assets of *Erasmus*.

Again, in *Macnamara v. Jones* (l), Mrs. *Macnamara* (the plaintiff) was entitled, under the marriage settlement of her father, *Arthur Jones*, to 10,000*l*. *A. Jones*, by his will, devised all his real estates to trustees, to the use of his daughter for life, with remainders over; and ordered his personal estate to be laid out to the same uses; declaring that all annuities, &c., therein given, should be in full satisfaction of all demands the respective takers had upon him, except servants' wages. Some copyholds, in which the testator had only an equity of redemption devised by the will to the same uses, had not been surrendered to the uses of the will; and the question was, whether the plaintiff could take the 10,000*l*. under the settlement, and the copyholds in fee, as heir-at-law, consistently with the devise; or must elect between them and the provisions by the will. Lord *Thurlow* decided, that she must elect; observing, with respect to the copyhold, when the legal estate was not in the devisor, no surrender was necessary; he having only an equity, it passed by the will: that the plaintiff must convey them to the uses of the will, and could not take the benefits under the will, but upon the term of extinguishing her claim under the settlement.

The next case is *Frank v. Standish* (m), *Margaret Frank*, being seised of freehold estates and some copyhold lying dispersedly, and having surrendered her copyhold estates to the use of her will, devised all her real estates, as well freehold as copyhold, and gave Lady *Standish*, who was one of her co-heirs, 1,000*l*. After making her will, she exchanged some part of those copyhold lands for others, which were surrendered to her; but which she did not surrender to the uses of her will. The question was, whether Lady *Standish* and the other co-heiresses, claiming also the copyholds unsurrendered, should be put to election between their right as co-heiresses, and the benefit under the will, and the Court being unanimously of opinion that the case was within the reasoning of *Noys v. Mordaunt* (n), and as Lady *Standish* had elected to take the legacy of 1,000*l*., the decree was, that she

(l) 1 Bro. C. C. 480.

in 15 Ves. 391, note.

(m) Ib. 588, note; also reported

(n) *Supra*, p. 1567.

and the other co-heiresses should surrender the copyholds to the uses of the will.

General doctrine illustrated.

In *Lewis v. King and wife and Another* (o), *Edward Hawkins*, the father of *Esther King*, (one of the defendants), devised copyholds called *Nunmead Pool*, in *Staines*, (and let on lease with other premises called the *Nurseries*, at *Staines*), unto the defendants, *King* and wife, for their lives and the life of the survivor; with remainder to the plaintiffs, *William Lewis* and *E. Wells*, as tenants in common in fee. After reciting that he had lent *King* 400*l.* on bond, and that *King* and wife had mortgaged to him the lands called the *Nurseries*, (which was the estate of *Esther King*), he gave *King* and wife the 400*l.* and all interest which should be due at his death, and directed his executrix to deliver up the bond cancelled, and assign the mortgage to them. In consequence of his having given up the said bond and mortgage, he desired that the survivor of *King* and his wife would, at his or her death, give the mortgaged premises to the plaintiffs in like manner as he had given them *Nunmead Pool*. The testator made his wife executrix and residuary legatee, who proved the will, and delivered up the bond and mortgage cancelled to *King* and his wife: who afterwards sold the *Nurseries* to the other defendant, *Johnson*. The question was, whether *George* and *Esther King*, by accepting the cancelled bond and mortgage, were not bound to fulfil the instructions of the testator. It was decreed by *Buller, J.*, (sitting for the Chancellor), that *King* should pay the 400*l.* into the Bank, to be laid out in three *per cents.*, the dividends to be paid to *King* for life, after his decease to his wife for life, and after their deaths, with liberty to the person or persons then entitled to apply, &c. Upon appeal to the Lord Chancellor, he affirmed the decree; observing, that the testator had disposed of the estate of another person, giving that person other property; then the party taking the property disposed of, must give up that which was given in exchange for it, to reimburse the devisee for his disappointment. Everything the *Kings* took should be brought into Court as a security for the purposes of the will.

The next case in order is *Blake v. Bunbury* (p). On the marriage of Sir *Patrick Blake*, the father, a rent-charge of 2,000*l.* to commence from his death, and to be issuing out of plantations,

(o) 2 Bro. C. C. 600.

Lord *Rancliffe v. Parkins*, 6 Dow.

(p) 4 Bro. C. C. 21; 1 Ves. jun. 149.

514, S. C.; see 1 Swanst. 420; also

General doctrine illustrated.

&c., in *St. Christopher's*, in the *West Indies*, was limited to trustees in trust for the first and other sons of the marriage in tail; which rent-charge was further secured by a demise of a term for two thousand years. There was a proviso for cesser of the rent-charge, upon Sir *Patrick* settling, within a limited time, lands in *England*, of the same value to the same uses. There was also a charge of 20,000*l.* for the portions of younger children, after the death of the mother, which sum was vested in stock, but afterwards lent to Sir *Patrick* upon mortgage of his estates in *Suffolk*. Sir *Patrick*, by his will, devised all his real estates in the *West Indies* and in *Great Britain*, to the use of trustees for a term of five hundred years, for securing certain annuities, and paying certain sums of money therein mentioned; and, subject to the term, to the use of *Patrick Blake*, his eldest son, for life, (*s. w.*), with remainder to his first and other sons in tail male; with remainder to his second son in like manner; with the ultimate remainder to the testator's right heirs; with powers for the tenants for life in possession to jointure charge with portions and lease. The testator also directed the trustees, during the minority of such of his sons as should be entitled to freehold estates, to apply any sum, not exceeding 800*l.* a year, for their maintenance and education; he also devised land, for the purchase of which he had contracted, and his house in *Portland Place*, to similar uses. The testator also devised all his plantations in the island of *Montserrat*, in the *West Indies*, to the same trustees, for five hundred years, to commence at his death (*s. w.*), to raise out of the rents 7,000*l.* for his younger son, *James Henry Blake*, at twenty-one, or in case of his death under that age, to sink into the estate; and, subject thereto, he gave the said plantations in the island of *Montserrat* to his eldest son, *Patrick*, (the plaintiff), for life, with remainders over; and he confirmed his settlement, whereby his son, *James Henry Blake*, and his daughter, *Annabella*, the only surviving daughter of his marriage, would be entitled to 20,000*l.* in equal moieties, so far as related to his said children; and he gave his personal estate, after payment of debts, to the plaintiff, if he attained twenty-one. The question was, whether the plaintiff was entitled to take the rent-charge and other benefits under the settlement, together with the estate subject to the rent-charge, or to be put to his election. Lord Commissioner *Eyre* decided, that he must elect between the will and the settlement; being of opinion that the testator, by the latter, intended to dispose of the whole estate, and to satisfy the rent-charge under the settlement, thinking

that he was giving his son a better thing, which included the rent-charge. With respect to a question asked in the argument, whether the plaintiff was to give up his contingent interest in the 20,000*l.*, his Lordship said, "He has no longer a contingent interest in it under the settlement; if he had, I should say, no. The testator has not affected to give it away, and consequently the question of election cannot apply to it." A strong argument in favour of the intention to substitute the provision by the will, for that, under the settlement, arises from the charge of 800*l.* a year for maintenance; for, if the testator meant to substitute one for the other, the eldest son would want maintenance; if it was cumulative, he would not, for he had maintenance under the settlement. The plaintiff immediately electing to take under the will was decreed to convey the rent-charge to the uses of the will, and was ordered to give security, to be approved by the Master; and, upon so doing, to be let into possession.

General doctrine illustrated.

In *Finch v. Finch* (q), by voluntary settlement in 1757, *Elizabeth Finch* settled lands and tithes in *Brinsworth* and *Rotheram*, in *Yorkshire*, and other hereditaments in *Kent*, to the use of *Saville Finch*, her only son, for life; remainder to his first and other sons in tail male; remainder to his daughters in tail male; remainder to *Mary Finch*, only daughter of *Elizabeth*, for life, with like remainders to her sons and daughters; with remainder to *Elizabeth* in fee. By deeds in 1758, *Elizabeth*, *Saville*, and *Mary Finch* joined in mortgaging the manors of *Thrybergh* and *Deneley*, the manors and hereditaments of *Brinsworth* and *Rotheram* to Lord *Middleton*, for securing a debt of 17,000*l.* and interest, due from the estate of *Henry Saville*, whose heir *Elizabeth* was, with a proviso for redemption on payment by *Elizabeth*, *Saville*, or *Mary*, and with a covenant to pay the mortgage money by *Elizabeth* and *Saville*. By an agreement in April, 1759, *Elizabeth*, in consideration of natural affection, agreed to convey to *Saville* all the lands, &c., *whereof she was possessed in the county of York*, except the estate at *Bramley*, with the household furniture, &c., he permitting her to have the use thereof when she should come there; and upon further consideration *that Saville should pay Lord Middleton all the sums she was indebted to him*, and pay to his sister *Mary*, when she should be possessed of all the estate of *Elizabeth* in *Kent*, 20,000*l.* for the fortune or portion of *Mary*, which *Saville* thereby agreed to do. The 20,000*l.* was

(q) 4 Bro. C. C. 40, 49; see also *Woodroffe v. Daniel*, 7 Jur. 959. *Nayler v. Wetherell*, 4 Sim. 114;

General doctrine illustrated.

not paid to *Mary* during her mother *Elizabeth Saville's* lifetime, nor was she a party to the last agreement, nor to the following, entered into in *November, 1759*, between *Elizabeth* and *Saville*. By the latter instrument it was agreed, that *Elizabeth* should take to her own use *all the estates* agreed to be settled upon *Saville* in *Yorkshire*, the estate at *Brinsworth* and *Rotheram* only excepted. *Elizabeth Saville*, by will in 1764, after directing the payment of her debts, gave to her daughter 20,000*l.* for her fortune and advancement in life, to be paid within six months after the testatrix's death, with interest at four *per cent. per annum*, with which she charged her personal estate, and all her freehold manors, &c., tithes, hereditaments, and real estate whatsoever; and subject thereto, and to certain annuities, the testatrix gave all her freehold manors, &c., to *Saville* in fee, and appointed him executor. By indentures of lease and release in 1769, reciting *Elizabeth's* death and Lord *Middleton's* mortgage, and that *Saville*, as the only son and heir of *Elizabeth*, and also under the general devise in her will was become entitled to the equity of redemption in the premises, subject, with the other estates of *Elizabeth*, to the payment of 20,000*l.* to *Mary*; and reciting, that there was due 18,020*l.* to Lord *Middleton*; the agreement for the loan by *Sitwell* of 25,000*l.*; and *Mary's* agreement to release the premises from the 20,000*l.*, but without prejudice to her claiming the same out of the other hereditaments charged with the payment thereof; Lord *Middleton*, in consideration of 18,020*l.* paid by *Sitwell*, released, and *Saville* and *Mary*, in consideration of 6,980*l.* to *Saville* paid by *Sitwell*, released and confirmed the premises comprised in the mortgage of 1758, discharged of the 20,000*l.*, but subject to redemption on payment of the 25,000*l.* and interest by *Saville*. There was also a mortgage bond from *Saville Finch* to *Sitwell*. By bargain and sale enrolled of even date with the last mortgage, it was covenanted that *Saville* and *Judith* his wife, and *Mary Finch*, should levy a fine to *Sitwell*, but it did not appear that it was levied. There was a further charge by *Sitwell*, in 1772, for 5,000*l.* in which *Mary* joined, but the covenant for redemption was by *Saville* alone. Also a further charge for 3,000*l.* in 1775, by indorsement, but which *Mary* did not execute. *Mary* did not receive any of the mortgage monies, nor any consideration for her concurrence: she had been paid her 20,000*l.* in 1774. *Saville Finch*, by will in 1788, among other legacies and annuities, gave an annuity of 200*l.* to his sister *Mary* for life; and subject to the payment of his legacies, annuities, and debts, he devised and bequeathed all his real and

personal estate whatsoever to his wife *Judith*, her heirs, executors, &c., for ever, and appointed her sole executrix. By codicil, attested only by two witnesses, he gave an additional annuity of 300*l.* to *Mary* for life, payable as the annuity of 200*l.* The testator died leaving *Judith* and *Mary* surviving, but no issue. One of the questions was, whether *Mary* was entitled as well to a life estate in the lands at *Brinsworth* and *Rotheram*, as to the two annuities under the will and codicil of her brother *Saville*; or whether she must elect between them? Lord Commissioner *Eyre* was of opinion, that she was entitled to a life interest in the lands of *Brinsworth* and *Rotheram* under the settlement of 1757, notwithstanding her acceptance of the 20,000*l.* under her mother's will; and that she was bound to elect between her life estate under the settlement and the annuities under her brother's will. He thought that, although the lands were not named, yet that under the general devise of *all* his lands he intended to include those. His Lordship observed, that the lands were included in the mortgage in 1758, in the assignment to *Sitwell* in which *Mary* joined, and in which it was recited they were devised by *Elizabeth* to *Saville* in fee, charged with the 20,000*l.*; that from that time there was no recognition of the settlement, which was voluntary, and which, as there was no issue of *Saville* or *Mary*, had become of little consequence, and from these circumstances his Lordship thought that *Saville* considered himself, and was considered by *Mary*, as owner of the fee simple, and accordingly decreed, that in the event of her electing to take under *Saville*'s will, she must convey her life estate as the Master should direct.

General doctrine illustrated.

In *Whistler v. Webster* (r), *John Whistler*, in 1784, assigned certain leasehold premises and monies to a trustee, upon trust to raise 3,000*l.* and to invest it in government or real security, and pay the produce to *John Whistler* himself for life, remainder to his wife: *Elizabeth* for life; and after her decease, to pay the principal to and among all and every or such of the *children* of *John Whistler*, in such shares, &c., as he should by will appoint, and in default thereof to and among all the children of *John Whistler* by his wife *Elizabeth* equally. The fund was laid out as directed, and *John Whistler* by his will bequeathed to his son *John* 1,000*l.*, and to his son *Hugh* 4,000*l.*; and reciting that he was bound for his son *William* in 300*l.*, he gave him 100*l.* more, if there should be sufficient effects after paying the other legacies; he gave his daughter *Mary* 500*l.*, and his daughter *Jane* 1,000*l.*,

General doctrine illustrated.

directing that she should be excluded therefrom, if she should attempt to marry without leave of her mother or guardians. The will proceeded thus: "I also give to my granddaughter *Elizabeth Reeves* 1,000*l.*, to be paid to her after my wife's decease out of a deed of trust. In case my said granddaughter die before my wife, I give and bequeath the said sum of 1,000*l.* after my wife's decease, to my youngest daughter *Jane Whistler*;" the testator then gave to the children of his eldest son *John Whistler* 900*l.*, equally to be divided among them after his wife's death out of the deed of trust; and in similar terms gave 500*l.* to his grandson *Emanuel Reeves*, and 600*l.* among the children of his daughter *Mary Reeves*, except *Elizabeth*; and in case *Emanuel Reeves* should die before testator's wife, his legacy of 500*l.* was in like manner given to the children of *Mary Reeves*, except *Elizabeth*. The testator gave the residue of his effects to his son *Hugh* and daughter *Jane* equally, and made Lady *Webster* and his wife executors and guardians. The appointment to the grandchildren being invalid, the question was, whether the children should elect between the provisions by the articles and will. Lord *Alvanley*, M. R., decided that they should, observing, "If the instrument is such as to indicate what the intention was, the only question I will ask is, did he (the testator) intend the property to go in such a manner? I will not ask whether he had power to do so, and whether he would have done it, if he had known he could not without a condition imposed upon another person? Whether he thought he had a right, or knowing the extent of his authority, intended by an arbitrary execution of power to exceed it, no person taking under the will shall disappoint it." His Lordship, in conclusion, said, "if they (meaning the testator's children the proper objects of the power) will have this fund, I will take away their legacies, which shall go in compensation as far as they will" (s).

In *Wilson v. Mount* (t), *Thomas Fletcher* devised several estates specifically, and all other his freehold and copyhold messuages or tenements, lands and hereditaments whatsoever and wheresoever, whereof he should die seised or possessed (the copyhold part whereof he had surrendered to the use of his will), upon trust to sell, directing the produce to form part of his personal estate, which he disposed of subject to his debts. He gave 2,000*l.* in

(s) See also *Vane v. Lord Duncannon*, 2 Scho. & Lef. 118; *Kater v. Roget*, 4 Yo. & Coll. (E.), 18.

(t) 3 Ves. 191; see also *Abdy v. Gordon*, 3 Russ. 278.

trust to pay the interest to *Richard Morhall* for life, and after his decease, the principal to his children. He gave 1,000*l.* in the same manner in trust for *Harry Mount* and his children, and if they died under twenty-one, one moiety of the principal to *William Mount*, and the other moiety and 1,000*l.* upon trust for *Jane Meyrick* and her children, and if her children died under twenty-one, to *William* and *Harry Mount* equally. He also gave 2,000*l.* in trust to pay the interest in moities to *Nathaniel* and *Thomas Mason* for their lives, and after their deaths to their wives respectively for their lives, and after their deaths the principal in moities to their children, and in case they should die under twenty-one, according to the appointment of *Nathaniel* and *Thomas Mason* respectively. He appointed the trustees executors. *Richard Morhall*, *William Mount*, and *Nathaniel Mason* were his heirs-at-law, and by the custom. The testator was seised of copyholds in tail as well as in fee, which he had surrendered to the uses of his will; and one of the questions was, whether the heirs must not elect to take under the will or the entailed copyhold estate? Lord *Alvanley*, M. R., decided that they must; for it was clear the testator intended to pass the entailed copyhold.

General doctrine illustrated.

In *Rutter v. Maclean* (u), *Olive Knight*, being entitled to a moiety of the real and personal estate of *Richard Glover*, at the time of her marriage with *Edward Knight*, in 1777, was in possession of the moiety of the real estate. In 1782, she concurred in a fine and recovery of this moiety, to enure to her husband in fee, in consideration of his agreeing with *Rutter* and *Bye*, trustees on her behalf, by deed or will to settle the whole, or such part of the premises as should not be sold in his lifetime, upon herself for life, in case she should survive him; and after her decease upon her issue, as therein mentioned; and in default of such issue, for *Edward Knight* in fee: and in case he should sell all or any part of the premises, to settle an adequate sum of money in lieu thereof, to be paid within six months after his decease, in case *Olive* should survive him, and to be invested in the funds on a good security in trust for *Olive* for her life; and after her decease, for her issue, &c., as before; and in default of issue attaining a vested interest, then the principal was to go to the personal representative of *Edward Knight*. For the performance of this agreement, *Edward Knight* gave a bond in the penalty of 1,000*l.* to the trustees. *Edward Knight* and his wife filed

(u) 4 Ves. 531.

General doctrine illustrated.

a bill against *Maclean* and his wife (the person entitled to the other moiety of the real and personal estates of *Richard Glover*) for an account, and the performance of an agreement between them; and the accounts were accordingly directed. *Edward Knight* died in 1790, having by will, dated 1786, given all his household furniture, plate, &c., to his wife, absolutely; and devised the residue of his real and personal estate to *John Rutter*, in trust to pay the rents of his messuages, &c., to his wife for life, and after her death to sell the same, and pay the money among his brother and sister, nephews and niece equally. He also gave the residue of his real and personal estate to the same trustees, upon trust to convert into money, and invest it upon security, and pay the produce unto his wife for her separate use for life; and after her decease, to apply the funds as before directed concerning the produce of the freehold premises; and appointed *J. Rutter* his executor. In 1792, *Olive* married *T. Wright*, who, in 1795, became bankrupt. A bill of revivor and supplement was filed by *Rutter* against the widow and executrix of *Maclean*, and the assignees of *Wright* the bankrupt; praying a revival of the suit, and that the assignees might state what interest they claimed in a moiety or any part of the personal estate of *Richard Glover*. Their answer stated, that *Edward Knight* possessed himself in his lifetime of some parts of the personal estate of *Richard Glover*, and at several times sold part of the real estate; and they set forth an assignment in 1783 by *Wright* and his wife to *Rutter* of a moiety of two sums due to the estate of *Glover*, and of their moiety in the residue of the personal estate, which assignment formed the subject of the cause of *Wright v. Rutter* (x); they also stated the answer of *Rutter*, admitting the want of consideration. The answer then suggested that the assignment did not vest the residue in *Knight*; but that, upon his death, being a *chose in action* of his wife not reduced into possession in his lifetime, it survived to her; and they submitted that the bankrupt in her right became entitled to it. The answer further stated the decree of the Master of the Rolls in the case of *Wright v. Rutter*; namely, that the plaintiff *Olive* should elect to take under the will of *Edward Knight*, or the moiety of the personal estate of *Glover*: that *Wright* was, at the time of the decree, insolvent, and had committed an act of bankruptcy: that the person concerned for *Wright* and wife, knowing that the personal estate of *Glover* would, if recovered,

(x) 2 Ves. jun. 673.

be liable to the debts of *Wright*, and that the benefit *Olive* took under her late husband's will was for her separate use, elected, therefore, to take under the will, and that the Master of the Rolls consequently dismissed the bill. They further stated, that they believed the bond of *E. Knight* did not appear in the cause, and therefore claimed a moiety of the personal estate of *Glover* under the bankruptcy. But Lord *Loughborough* said the bond only constituted the wife a creditor upon the estate of her husband; and as she was also devisee, she must elect. That the bond did not make it less a case of election, and, with respect to that, she must judge for herself whether she would take what was given, or claim against the will. His Lordship said, he did not see how the assignees could fight on behalf of the wife against her will. As to *E. Knight's* not having possession, this property, coming from *Glover*, was so entangled in suits, that it was impossible for him to get at it. They agreed it should be the husband's; and they suffered a recovery of the real estate which they could get. Then they contrived this deed (meaning the assignment of 1783), which they thought would give him the personal property; and he relied upon that; and, observing that he saw the intention of the wife to give it to her husband, his Lordship determined the election valid, and the decree gave directions for taking the accounts.

General doctrine illustrated.

The next case is *Blount v. Bestland* (y). There *Sarah Brewin* bequeathed to *Ann Simpson*, the wife of *Thomas Simpson*, 600*l.* to be paid within twelve months after the testatrix's decease; and she appointed *S. Bestland* executrix. The testatrix died in 1790. Above a year after her death, *Thomas Simpson* died, having by his will disposed of the legacy of 600*l.* to his wife for life, and after her death to his children, and having given to her another inconsiderable benefit. His widow, having two children, by him, married *William Blount*. The bill was filed by *Blount* and his wife, claiming the legacy, against the testatrix of *Sarah Brewin*, the executor of *Thomas Simpson*, and the two infant children. One of the questions was, whether Mrs. *Blount* ought not to elect between the 600*l.* and the other benefit given her by the will of her late husband? The 600*l.* was out upon a mortgage, which was vested in *S. Bestland*, and Lord *Loughborough*, C., directed *S. Bestland* to call in the money, and declared that the plaintiff *Ann Blount* was entitled to the same; and that the

(y) 5 Ves. 515; see also *Pole v. Thellusson v. Woodford*, 13 Ves. 209. Lord *Somers*, *supra*, p. 1085, also

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interest due at the time of her marriage with the other plaintiff should be added to the principal; and that she was not entitled to any benefit under the will of *Thomas Simpson*, as she elected to take against the will.

The preceding cases are abundantly sufficient to establish and illustrate the equitable doctrine of election; the more recent cases will be cited in the following sections of the present chapter.

We close this section with observing, that a devisee is not precluded from enjoying a derivative interest incidental to an estate taken in opposition to the will; so that the husband of a tenant in tail, who elects against the will, may take benefits given him by the will, and yet enjoy the estate by courtesy incident to the estate tail retained by his wife (z).

We proceed to consider the doctrine of election more in detail.

SECT. II. The requisites essential to election.

Of the requisites essential to election.

In order to impose upon a party claiming under a will the obligation of making election, the intention of the testator must be expressed, or clearly implied in the will itself in two respects; *first*, to dispose of that which is not his own; and *secondly*, that the person taking the benefit under the will should take under the condition of giving effect thereto; or, in other words, that the person taking should relinquish any inconsistent right; for, if such intention be not clear, the person taking the benefit under the will, will not be obliged to make election between that benefit and his own independent right.

Primâ facie it is not to be supposed that a testator disposes of that which is not his own; his intention, therefore, so to do, must appear by demonstration plain, by necessary implication, involving the utter improbability that he could have meant otherwise (a).

It rests upon those contending for a case of election, to shew that there is such manifest plain demonstration; and evidence, *dehors* the will, will not be admitted to prove or disprove such intention, though it should seem that it will be admitted to shew the state and circumstances of the property (b).

(z) *Lady Cavan v. Pulteney*, 2 Ves. jun. 544; 3 Ib. 384; see also *Brodie v. Barry*, 2 Ves. & Bea. 134.

(a) 6 Dow. P. C. 179.

(b) *Judd v. Pratt*, 13 Ves. 174; confirmed upon appeal, 15 Ib. 390.

Before the parties under obligation to elect can be compelled to perform the obligation, it is further requisite, that all necessary accounts shall have been taken, and the amount of what they are entitled to under the will settled and ascertained.

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The last requisite, and which relates to the validity of the election when made, is, that the party electing should be cognizant of his rights.

The subject of the present section will be discussed in the following order:

1st. Requisite, that the intention to pass the property be clear; and herein of parol evidence.

2nd. Requisite, a clear intention that the party taking should take under the condition to elect.

3rd. Requisite, that the property be ascertained.

4th. Requisite, that the party electing be cognizant of his rights.

First. The intention to dispose of the property must be clear (c). The reader cannot have failed to observe, in all the cases before stated, that it formed the important preliminary to the introduction of the doctrine in question. The various judgments, when perused at length, will discover a uniform anxiety in the Court to discover the testator's intention to dispose of property which did not belong to him; and his misconception of his interest in, and power over, that property, was no bar to the introduction of the doctrine, but, on the contrary, afforded evidence of his intention.

1. The testator's intention to dispose of the property must be clear.

The case of *Stratton v. Best* (d) is a further illustration of the doctrine. There *John Light*, in the year 1764, suffered a recovery of the *entirety* of the manor of *B.*, though he was in fact only entitled to a part of it. By his will, made subsequently, he devised in general terms all his real and personal estate to trustees, &c. Evidence was produced, which proved that the testator supposed himself entitled to the *whole* manor: and the question was, whether as the testator supposed himself entitled to the whole manor, it was sufficient to put the legatees to their election. Lord Chancellor *Thurlow* said, "I think the testator did, at the time of suffering the recovery, consider himself as having a power to dispose of the whole estate; but can I construe it so, unless

(c) See *Thellusson v. Woodford*, *infra*. (d) 1 Ves. jun. 285.

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there be something in the will to shew it? Suppose *White-acre* and *Black-acre*, and that the testator has a disposing power over the one, and not over the other, can the Court admit evidence *dehors* the will to shew the testator's conceit about it? I admit that you have proved, that in 1764, when the recovery was suffered, he took himself to be master of the whole; I have no doubt, but that if he had been asked when he made his will, whether he did not mean the whole, he would have answered, yes; and if desired to put in a description of it, he would have done so. That I believe upon the evidence you have brought; but to do this, I must say that evidence *dehors* the will of the testator's opinion at an time may be produced; and I do not think that is the law of the Court upon this subject. All the argument in *Noys v. Mordaunt* (e), and the whole suite of cases, have turned upon the expressions of the will. If I were to receive evidence of the testator's fancy, it would introduce a very desperate rule of property in this Court."

In the case of *Blommart v. Player* (f), an instance will be found wherein the heir was not put to his election, because the intention to dispose of the estate in question was not apparent in the will.

In *Dummer v. Pitcher* (g), a husband, before making his will, transferred two sums of four *per cent.* and five *per cent.* stock, then forming the whole of his funded property, into the joint names of himself and his wife. By his will, he gave the rents of his leasehold houses, and the interest of all his funded property, or estate of whatsoever kind, upon trust for his wife for life, and after her decease upon trust to pay divers legacies of four *per cent.* stock, the aggregate amount of which fell short by 50*l.* only of the amount of stock of that description so formerly transferred by him. He afterwards made some further purchases of five *per cent.* stock, taking the transfers in the joint names of himself and his wife; and died in her lifetime, leaving no funded property, except the four *per cents.* and five *per cents.* before mentioned, exclusive of which, his assets were wholly insufficient to pay his legacies: Sir *L. Shadwell*, V. C., decided, first, that all the sums of stock, then standing in the joint names of the husband and wife, and whether transferred before or after the date of his will,

(e) *Supra*, p. 1567.

Russ. & M. 244.

(f) 2 Sim. & Stu. 597; see also
Attorney General v. Lord Lonsdale,
1 Sim. 105; *Johnson v. Telford*, 1

(g) 5 Sim. 35; confirmed 2 Myl.
& K. 262; see also *Dixon v. Samson*,
2 Yo. & Coll. (E.), 566.

became, by survivorship, the absolute property of the wife; secondly, that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election.

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In the subsequent case of *Coates v. Stevens* (*h*), the wife was put to her election, between stocks which became her absolute property by survivorship, and the benefits given by her husband's will. The intention to give the stock was clear. The testator specifically describing it, as his property then standing in the joint names of himself and his wife.

In the case of *Stratton v. Best* (*hh*), the reader will see that Lord *Thurlow* distinctly rejected the admission of parol evidence of the testator's intention; observing, that he did not think it the law of the Court to admit it; but the rule of the Court, if such as Lord *Thurlow* conceived it, has been relaxed. In *Pulteney v. Lord Darlington* (*i*), the testator had upwards of 20,000*l.* in his hands, for which he was debtor to the trusts of the settlement. That sum was *primâ facie* real estate in his hands. He was tenant for life, and all the real uses of a strict settlement attached upon it. His steward put down upon paper that this sum of 20,000*l.* was part of his estate; and this paper was admitted as evidence to prove that the testator intended to comprise in the will this sum, of which he supposed himself owner. Lord C. Justice *De Gray*, in a note of his judgment given by Lord *Alvanley*, M. R. (*j*), said, "The intention appears from circumstances sufficient to make an impression upon my mind, and confirming the opinion I had formed, not to throw entirely out of the case this settlement by a great family. A man may give by a mean, and indirectly, what is not his own, either by express condition, or equity arising upon an implied condition; the two modes are quite different, and were too much blended in the argument."

Lord *Eldon*, in *Pole v. Lord Somers* (*k*), disapproved of the admission of such evidence; and again, in *Druce v. Denison* (*l*), said, the difficulty he felt as to the case of *Pulteney v. Darlington* was, upon what principle Lord Chief Justice *De Gray* suffered the circumstances to make an impression upon his mind.

Parol evidence.

(*h*) 1 Yo. & Coll. (E.), 66.

(*hh*) 1 Ves. jun. 285, *supra*, p. 1583.

(*i*) Reported in 1 Bro. C. C. 222, but not upon this point, but referred to in *Lady Cavan v. Pulteney*, 2 Ves. jun. 544; *Ib.* 384; *Hinchcliffe v. Hinchcliffe*, *Ib.* 516; *Pole v. Lord*

Somers, 6 *Ib.* 309; *Druce v. Denison*, *Ib.* 385; 7 Bro. P. C. Toml. ed. 530.

(*j*) In *Hinchcliffe v. Hinchcliffe*, 3 Ves. 530.

(*k*) 6 Ves. 309.

(*l*) Next stated.

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In *Druce v. Denison*, next stated, Lord *Eldon*, observing, that he did not understand the *dicta* in *Pulteney v. Lord Darlington*, and *Hinchcliffe v. Hinchcliffe*, that in cases of election evidence was admissible, but not to explain the will, says, "If they mean that it is admissible only to explain the subjects of bequests ambiguously described, and then not to explain the will, but to make you understand what subjects the testator meant to describe, which upon the face of the will you cannot understand, that is intelligible; but if they mean, that it is admissible to prove what the testator meant by the words, "my personal estate" (*m*), and that he meant a great deal more than those words would carry by their natural or legal import, and if a case of election is raised upon that, in fact and substance evidence is admitted to raise a case of election thereby explaining the will."

It is impossible not to see the force of the above observation; and, with reference to the rules of the Court upon the admission of parol evidence in cases of wills, difficult not to come to the conclusion that *Pulteney v. Lord Darlington* infringes upon those rules.

In the case of *Druce v. Denison* (*n*), in which the preceding observation occurs, *Samuel Denison*, reciting in his will that by settlement previous to his marriage with *Lucy Denison*, 4,000*l.* four *per cents.* and 3,000*l.* *India* annuities were settled, so that *Lucy*, in the event of surviving him, would be entitled to the whole, and that he had covenanted to secure to her the further sum of 160*l.* *per annum* for life, out of such other real and personal estate as he should die possessed of, confirmed the settlement, except as to that covenant; in lieu of which he directed his executors to purchase 10,000*l.* three *per cents.*, upon trust for his wife for life, with remainders over after her death to his niece *Mary Gason* and her children. The testator also gave his wife a house and furniture for life, a legacy of 200*l.*, and some specific articles. After several specific devises and bequests, he directed an estate to be sold, and the purchase money, with the residue of his *real and personal* estate, to be converted into money, upon trust, as to the interest and dividends of one moiety, for his widow for life, and after her death, as to the principal for *Samuel Price Denison*; and the other moiety he gave to *Mary Gason* for life, and after her death, the principal to her children. By an unattested codicil, the testator revoked the bequests in his

(*m*) The words in question, in
Druce v. Denison.

(*n*) 6 Ves. 385.

will made in favour of *Samuel Price Dentson*, and his next of kin (the widow being excluded in case of his intestacy by the settlement) claimed the moiety of the personal estate, of which the bequest was revoked by the codicil, as undisposed of. One of the questions was, of what particulars the personal estate consisted; the next of kin insisting that not only the testator's own property, but also that to which his wife, at the time of her marriage, or during its continuance, was entitled, must be considered as belonging to him. It did not appear that anything came to the wife after her marriage, but at the time of her marriage she was entitled, as residuary legatee of her aunt *Lucy Hammond*, to two mortgages, and several leasehold houses, and a moiety of a contingent legacy of 2,000*l.* of Old South Sea annuities, expectant upon the death of *Martha Hammond* without issue. The next of kin contended, that this property must be considered as the testator's; *first*, upon the ground that he was a purchaser by the settlement of what his wife was entitled to at the marriage; *secondly*, that he did sufficient to reduce it into possession; and *thirdly*, that he considered this property as his own, and therefore she must elect. Upon the second ground it appeared by the report that the testator and his wife, before their marriage, as joint executors of *Lucy Hammond*, executed a bond to *Martha Hammond* for the payment of her legacy of 2,000*l.* under that will, and took from her a release; and that he, in his books of account of the executorship, charged *Lucy Hammond's* estate with payment of the stamp, and stated the funds remaining, subject to the trusts of her will, to be the 2,600*l.* mortgage by *Lyster*, subject to *Martha Hammond's* legacy of 2,000*l.*; that he received the rents of the houses; accounted for the same to the mortgagors, after deducting the interest, out of which he paid the interest of the bond; that he also granted leases of the leasehold property belonging to his wife; in some instances granting the whole term, in others leaving a reversion; as to some granting actual leases, as to others, executing agreements only. As to the third ground, the report stated, that a paper written by the testator was found at his death among his papers, in a box at his chambers, together with his will, entitled thus: "Statement of my property, 26th *November*, 1792, when I made my will." Then in this paper he enumerated his freehold, copyhold, and leasehold estates, including those of his wife, and his bonds, mortgages, and other securities, omitting the contingent legacy only; and in the last clause, he noticed the mortgage belonging to his wife before marriage in this manner:—

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“*Harley Street* mortgage; annual interest 30*l.*, principal 600*l.* :” that mortgage, with several other securities, was classed under this description, *viz.*, “General personal estate applicable to the payment of debts and legacies.” The third ground being that, upon which the Court finally decided the cause, it became necessary to determine the effect of the paper writing to explain the terms “real and personal estate” in the will. Lord *Eldon*, on the first point, was of opinion, that the husband was not a purchaser; and, on the second and third points, his Lordship, towards the close of his judgment, after commenting upon the case of *Pulteney v. Lord Darlington* (*o*), and stating the difficulty he felt upon that case, proceeded thus: “Then the question is, can I admit this paper as evidence? That question arises in a case in which this property was more or less strictly the personal estate of the testator, in all the senses I have represented, independent of evidence, the testator having by actual leases acquired out of his wife’s property personal estate of his own; having by agreements for leases acquired such interests as those agreements would give him; having constituted himself, if he should ever pay the bond debt, a creditor upon his wife’s *chose in action*, and in that respect made that his own; and, beyond those interests acquired by his own acts, having his wife’s personal estate in this sense his, in right of his wife, whether in such a complicated situation, it is possible to admit *parol* (*p*) evidence, that by the words ‘my personal estate,’ he meant, not only *his* strictly, but also that which in a sense must be admitted to be his personal estate; attending to the fact, that a great portion of this property he must be entitled to dispose of, because he had made it in a strict sense his. If the question were new, I should doubt whether, in a case so circumstanced, it would be a violation of the rule to admit evidence; for it is not a contradiction of the will, but only goes to this, that, as he might mean the words in one sense, or the other, he did mean that property which in both senses was his. But it is not necessary to decide upon that ground; for, after the case of *Pulteney v. Lord Darlington*, and what Lord Chief Justice *De Gray* (*q*), Baron *Eyre* (*r*), and Lord *Alvanley* (*s*), have said, whatever my own opinion might have been prior to *Pul-*

(*o*) Cited 3 Ves. 530; 6 Ib. 390; Reg. Lib. A. 1773, fo. 710; 1 Bro. C. C. 222: 7 Bro. P. C. 530.

(*p*) His Lordship observed, in the course of his judgment, that this paper, though written, was in a sense

parol evidence.

(*q*) In *Pulteney v. Darlington*, as before cited, 3 Ves. 530.

(*r*) Ib.

(*s*) Ib.

teney v. Lord Darlington (and I agree with *Lord Rosslyn*, that I cannot see upon what principle the evidence was admitted in that case); after all this authority, I do not think myself at liberty to reject this paper as evidence." His Lordship decided that he was of opinion, that the testator did bequeath all the residuary estate of his wife, as his own personal estate; and accordingly that a case of election was raised. His Lordship, in conclusion, stated, that he was the more satisfied with the justice of the decision, because, though he did not think Lord Chief Justice *De Gray* was correct in allowing circumstances to make an impression upon his mind, if they never ought to have found their way to his mind, this paper must either be looked at as evidence, or the party ought to have the opportunity of propounding it as a testamentary paper, to the Ecclesiastical Court, which his Lordship, in a former part of his judgment, thought that Court would receive.

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property.

In *Doe v. Sir Arthur Chichester* (t), which decided that where lands *at* or *of* any particular place are devised, parol or extrinsic evidence is not admissible, to shew that the deviser included under the description, and intended to pass other lands not at that particular place, (a decision very nearly affecting the subject in discussion), Lord *Eldon* makes the following observations: "With respect to election, I decided the case of *Druce v. Denison*, and stated that the subject, as to which the election is to be made, must be clearly described in the will. I there too stated my opinion of the decision of *Pulteney v. Lord Darlington*, but with that case and the other authorities before me, I thought it right to decide as I did, subject to any review, in case it should be deemed fit to attempt to shake these authorities, unless the parties felt that there was some weight in another observation, that the paper there in dispute was of such a testamentary species that it would be received in the proper Court as part of the will; and, if so, there would be an end of all question. The parties seem to have thought that there was some weight in this last observation, and the matter was no more heard of. But as to the decision of Lord *Thurlow*, speaking with the utmost deference, I doubted its soundness; and I have Lord *Loughborough* with me: and as to the case of Lord *Kenyon*, the name of which, I think, was *Andrews v. Lemon*, where a testator bequeathed all his personal property (he having personal property

(t) 4 Dow. P. C. 65, 78, 89; and see *Miller v. Travers*, 8 Bing. 244; and *Hiscocks v. Hiscocks*, 5 Mee. & Wel. 363.

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of his own, and also personal property not strictly his own, but which he had power to dispose of by deed or will) for purposes for which his own was insufficient, Lord *Kenyon* sent it to the Master, to inquire, whether by personal property he meant his own strictly, or intended to include both. But when the evidence was taken, he was so much struck with his own decision, that he said, "though the evidence has been taken, I shall not admit one word of it; it being necessary for the general interest of mankind, that persons should, in their wills, state clearly what they mean."

The rule, therefore, that parol evidence, though not admissible to explain the testator's meaning, may be admitted to explain the circumstances and state of the property, as acknowledged in the case of *Judd v. Pratt* (u), seems to have been broken in upon by the preceding case of *Pulteney v. Lord Darlington*, followed by *Druce v. Denison*; but it may be doubted, whether, if the point should be brought before a higher tribunal, those cases would not be overruled.

Indeed in the recent case of *Clementson v. Gandy* (v), it was decided that such evidence was inadmissible to raise the question of election.

In that case it was tendered for the purpose of shewing, that the testatrix bequeathed property, as her own, which did not belong to her, and that she intended to leave a considerable residue for charitable purposes, which, by reason of the alleged mistake, turned out to be much less than she intended. Lord *Langdale*, M. R., considered the intention to dispose clearly expressed; that there was no ambiguity in the expressions employed, and that the extrinsic evidence, being tendered for the purpose of contradicting the intention, could not be received. His Lordship in the course of his judgment observed, that extrinsic evidence was not to be resorted to, except for the purpose of proving facts, which make intelligible something in the will, which, without the aid of such evidence, could not be understood.

2. Intention
 must be clear,
 that the party
 taking the be-
 nefit under the
 will should
 elect.

2. We proceed with the next *requisite*, (namely), a clear intention that the person taking a benefit under the will should be put to his election.

This appears from the case of *Read v. Crop* (w). There *William Balchen* devised all his freehold and copyhold estates, situate

(u) 13 Ves. 174.

(v) 1 Keen, 309.

(w) 1 Bro. C. C. 492.

at *Roydon*, *Thorley*, *Epping*, and *Witham*, in the counties of *Essex* and *Herts*, (which copyholds he had surrendered to the use of his will), and all other his freehold and copyhold estates, to *Crop* and *Tapp*, in trust for his wife for life; and after her decease, to sell and divide the produce among his children, in manner therein directed. The testator, at the time of his death, was seised in fee of a copyhold estate at *Witham*, and also of a moiety of an estate at *Thorley*: his wife being entitled to the other moiety in her own right. She was also seised in fee of two copyhold estates in *Roydon* and *Epping*, in which places the testator had no property; and he had no other real estates. Upon the question, whether the wife should elect, it was contended, on the one side, that the testator having taken upon himself to devise his wife's estate, although such disposition could not be maintained against her, yet if she disputed it, she must forfeit every devise in the will in her favour; and must therefore elect to abide entirely by the will, or take nothing by it. On the other hand, it was contended, that it did not appear the testator meant to devise his wife's estate; and that, although he had surrendered his own estate, and knew that was necessary to its passing; yet he had not attempted to surrender the other estates; and, therefore, certainly had no intention of devising them. He had not recollected, at the time of making his will, the respective rights to the different estates of which he was in possession; and, therefore, had words of sufficient extent to pass all; and Lord *Thurlow*, C., decided, that it was not a case of election against the wife, observing, "In *Thorley* the testator had a moiety of the estate, together with his wife; he did not intend to devise her moiety, for he describes what he meant to devise by the words, 'his estate, which he had surrendered.' He had not surrendered any of his wife's estates, so that they could not pass by the devise. The words are *too loose* to raise the construction contended for. It is not like any of the cases which I remember of election" (x).

Requisites.

Intention that the legatee should elect.

3. The third *requisite* that must concur, before a legatee can be obliged to make election, is, that all the necessary accounts should be taken, and the amount of what he is entitled to under the will settled and ascertained.

3. The amount of the property must be ascertained.

(x) See the judgment stated from 257; *Freke v. Barrington*, 3 Bro. C. Mr. Cox's MSS.; 1 Swanst. 402; C. 274.
see also *Baugh v. Read*, 1 Ves. jun.

Requisites.
Amount of
property must
be ascertained.

Thus, in *Newman v. Newman* (y), upon an appeal from the Rolls, it appeared that an estate had been settled, upon the marriage of the late Mr. *Newman* with the appellant, his widow, on the husband for life; remainder to the wife for life; remainder to the issue of the marriage; remainder to the wife in fee; and that a bond was given to secure 30*l.* a year to the wife, in case she survived him, as a further provision. That the husband by his will devised another real estate to the wife for life, remainder to the issue; but, if there should be none, then to the wife in fee, in bar of her other claims; and he gave to her the residue of his personal estate, after some specific and general legacies, in the same manner, and made her executrix; but the will was not attested to pass real estate. The question was, whether the widow should take the personal estate, together with her other claims; or was to elect between them, although the real estate could not pass by the will: and Sir *Thomas Sewell*, M. R., decreed, that she ought to elect; but he postponed the election, till an account should be taken of the personal estate; and the decree was affirmed by Lord *Thurlow*, C.

In *Chalmers v. Storil* (yy), the widow was put to her election between her dower and interests under the will; and Sir *William Grant*, M. R., said, that it was a case of election; but before she could be compelled to elect, she was entitled to know what she had a right to under the will.

The parties compellable to elect may file their bill to have all such necessary accounts taken (z).

4. A knowledge of right in the party electing.

4. The last *requisite* essential to election, and which relates to its validity when made, is a knowledge of right in the party electing.

So that, if legatees make their election, or receive for a length of time the provisions of the will, without knowing their rights, and the circumstances of the testator, they will not be bound by such election or receipt; this corresponds with the rule of the Court of Chancery in cases of dower.

Thus, in *Pusey v. Desbouvrie* (a), Sir *Edward Desbouvrie*, a freeman of *London*, possessed of a very considerable personal estate, compounded with his wife for her customary part. He

(y) 1 Bro. C. C. 186; also *Boyn-ton v. Boynton*, Ib. 444; also *Hender v. Rose*, 3 P. Wms. 125, notes; and *Whistler v. Webster*, *supra*, p. 1577.

(yy) 2 Ves. and Bea. 225, *infra*,

sect. III., sub-sect. 4.

(z) *Buttricke v. Brodhurst*, 3 Bro. C. C. 88; 1 Ves. jun. 171; *Pusey v. Desbouvrie*, next case.

(a) 3 P. Wms. 315, and notes.

had a son, the defendant, to whom he had given very large sums of money to enable him to trade, and a daughter. By his will he gave his daughter 10,000*l.* upon condition that she released her orphanage part, together with all her right to his personal estate by the custom of *London* or otherwise; and made his son executor. After the testator's death, it was agreed between the son and daughter, that she should take the legacy of 10,000*l.* upon the terms of the will; and a release was accordingly prepared. Before she executed it, her brother in the presence of their uncle, informed her, that she had an election to have an account of her father's personal estate, and to claim her orphanage part; but she declared she would accept the legacy left her by her father, observing it was sufficient for any young woman; she accordingly executed the release, being about twenty-four years of age; and her brother paid her the legacy with interest. She afterwards married one *Pusey*, an attorney, who filed the bill to set aside the release, charging that the personal estate, of which testator her father died possessed, was much above 100,000*l.*; the daughter's share of which by custom was upwards of 40,000*l.*; that the mother, having been compounded with for her customary part, the freeman's personal estate was to be distributed as if there were no wife; consequently the dead man's part was one moiety, and the children's part the other; and that the defendant the son had been advanced by his father, at different times, with several large sums of money, the whole of which would amount to a full advancement of the son, so that the plaintiff in right of his wife was entitled to a moiety of her father the freeman's personal estate. Lord *Talbot*, C., though he saw no fraud in the case, conceived it hard, that the sister should suffer for her ignorance; and that if the Court themselves had not till lately agreed in what proportions these customary parts should go, the daughter might well be ignorant of her right, and ought not to suffer or give others any advantage by her ignorance. That though the son had informed her of her right, either to accept the legacy or orphanage part, yet his Lordship hardly thought she knew she had a right to have an account taken, and first know what her orphanage part did amount to; and then, and not till then, she was to make her election; for probably she would not have accepted the legacy, had she known what the orphanage part amounted to; and his Lordship postponed the hearing until the amount of the father's personal estate at the date of the will, and at his death, and also what the advancements to the son amounted to. The cause was afterwards compromised.

Requisites.

A knowledge
of right in the
party electing.

Requisites.

A knowledge
of right in the
party electing.

In regard to the proportions of the orphanage part, when the wife had been compounded with as to her customary part, Lord *Talbot* observed in the last case not only the counsel had differed, but the Court had varied in their determinations. It had for instance, been determined, that where the husband had compounded with the wife before the marriage, he was a purchaser of her customary part, which he was to take as his own; but that then a different resolution seemed to have prevailed, namely, that it should in such case be taken as if there were no wife; and, consequently, the testator take one-half, and the children the other.

Again, in *Wake v. Wake* (b), the testator bequeathed to his wife 100*l.* to be paid out of his personal estate, within six months after his death; and, after some particular dispositions, gave all his estate and effects whatsoever, subject to an annuity of 35*l.*, to his wife for life, in trust for his son by a former wife, whom he made residuary legatee. The widow received her legacy, and also the annuity for *three years*; and then brought the bill claiming both the interest under the will and her dower, which was about 80*l.* a year. The trustees had let the son into possession at twenty-one, according to the directions of the will. The Court being of opinion that the widow ought to elect, the question was, whether, by receipt of the legacy and of the annuity for *three years*, she had not made her election to abide by the will. But *Buller, J.*, for Lord *Thurlow, C.*, thought otherwise, observing, "If the argument for the defendant holds, a single payment would have bound her: but the point is, whether she had full knowledge of the circumstances of the testator, and of her own rights. I think there was a case before me, about two years ago, at *Lincoln's Inn Hall*, which went much beyond this. If she had acted with full knowledge, she should not afterwards deny it, but after three years only, I cannot say she is not entitled. The legacy of 100*l.* and what she had received from the annuity must be accounted for."

If the question of election be doubtful, it may be sent to a jury to determine the fact (c).

It was stated *arguendo* by Sir *Edward*, then Mr. *Sugden*, in

(b) 1 Ves. jun. 835; also *Rumbold v. Rumbold*, *infra*; *Kidney v. Coussmaker*, 12 Ves. 136; and see *Dillon v. Parker*, 1 Swanst. 381; 1 Jacob. 505; aff. D. P. 1 Cl. & Fin. 303; and see *Edwards v. Morgan*, and

Morgan v. Edwards, M'Clell. Exch. R. 541; M'Cl. & Yo. 258; confirmed D. P. Dow & Cl. 104.

(c) *Roundell v. Curren*, 2 Bro. C. C. 73; 1 Swanst. 383, note.

Astley v. Milles and others (d), that Lord Hardwicke, C., had decided that a person might elect *by parol*; and that he, Sir *Edward Sugden*, had a manuscript note of the case. Application of election.

SECT. III. *Application* of the doctrine of election—

And,

1. *First*, to the heir at *Common Law*.

1. To the heir at common law.

It appears to be settled, that where the will, made before the first of *January*, 1838, is invalid, as a disposition of real estate, not being duly executed in the presence of and attested by three or more credible witnesses according to the Statute of Frauds (*dd*), so that the lands descend to the heir-at-law, he will not be obliged to elect between his right as heir, and any benefit that may be given him under the will; and the same rule prevails where the will is invalid as a disposition of real estate, by reason of the incapacity of the testator on account of infancy (*e*) or coverture. But, although the will were not duly executed according to that statute, still, if it contained an *express condition* that any legatee, who might not comply with its terms, should forfeit all benefit under it, there the heir would, by force of the condition, be obliged to make his election: and notwithstanding the devise, when made to the *heir*, might be considered void as to him, yet he was equally obliged to elect in that case, as though he were a stranger.

It may here be remarked, that a will within the 1 Vict. c. 26, which would raise a question of election against the heir, must be valid for all purposes.

The preceding propositions will be discussed in detail, under the following arrangement:

1. Where a will, made before the 1st of *January*, 1838, is invalid for want of due execution, according to the Statute of Frauds.

2. Where such will is invalid, on account of the incapacity of the testator by reason of infancy, or of the testatrix by reason of coverture.

3. Where such will, though not so executed, contains an express condition of forfeiture on non-compliance with its terms.

4. Where the will of a person dying before the first of *January*, 1834 (*f*), though duly executed according to the Statute of Frauds, is void, as a devise to the *heir*.

(d) 1 Sim. 326.

(dd) 29 Car. 2, c. 3.

(e) 13 Ves. 223-4.

(f) 3 & 4 Wm. 4, c. 106, s. 3.

Application of election.

To the heir at common law.

1. Where the will is invalid for want of due execution, according to 29 Car. 2, c. 3.

1. And *first*, where the will, made before the first *January*, 1838, is invalid for want of due execution according to the Statute of Frauds.

In *Carey v. Askew* (*f*), the father of the plaintiff being seised of freehold and copyhold (the latter of which he had surrendered to the use of his will) by his will charged his real and personal estate with his debts and legacies, and devised all his freehold and copyhold estates to his wife for life, and after her death to his two daughters, and any that he might have by his wife equally. He had two daughters, the defendants, and afterwards another daughter, the plaintiff, by a second marriage. He afterwards made instructions for a will, but died before the execution, charging his debts and legacies, and giving to his daughter by his second wife 15,000*l.* with a direction for maintenance. He then gave all his freehold and copyhold estates, and the residue of his personal estate to his two daughters by his first wife. Probate of the instrument was granted as to the personal estate. It was contended by the plaintiff that the copyhold estate did not pass by the unattested will. Another question was as to election by the plaintiff: Lord *Kenyon* said, it was not a case of election. Lord *Redesdale* cited *Stapleton v. Lord Colville*, 5 *July*, 1772, to the same effect.

Again, in *Sheddon v. Goodrich* (*g*), *Bridger Goodrich* of the island of *Bermuda*, by will duly attested, gave to his wife *Elizabeth Goodrich* all his estate in that island for life. After making further provision for his wife, and provisions for his son and daughters, and directing his executors, after his wife's death, to sell the whole of his real and personal estate, he gave the residue of his estate of what nature soever, which should remain in his executors' hands after performance of the directions of his will, to his only son *William Bridger Goodrich*, and appointed him residuary legatee. He then appointed *Robert Sheddon*, *John Goodrich*, and his wife, executors and executrix. At the date of the preceding will, the testator had four children named in it, but afterwards had another daughter; after which event he made another will, which was only attested by *two* witnesses; and by this will, after revoking prior wills, he gave to his wife his property at *Bermuda* to her and to her use for ever, and also gave her an annuity of 1,200*l.* sterling for life. The residue of his

(*f*) Cited by the late Sir *Samuel Romilly*, from his own note, 8 *Ves.* 492; reported, 2 *Bro. C. C.* 58, but not upon this point.

(*g*) 8 *Ves.* 481; see also *Hearle v. Greenbank*, 3 *Atk.* 697, 715, *infra*, p. 1601.

estate, of what nature soever in *England* or elsewhere, he directed to be placed at interest in the most advantageous manner, for the purpose of educating and clothing his five children (naming them); and he appointed his wife, *Edward Goodrich* and *Robert Patrick*, executrix and executors for managing his affairs in *Bermuda* and out of *England*, subject to the control of *Robert Sheddon* and *John Goodrich* of *Great Britain*, whom he appointed joint executors with his wife to manage his affairs in *Great Britain*. The testator added a codicil, bearing even date with the last will, and attested by the same two witnesses, in the following words; "The annuity of 1,200*l.* sterling granted to my wife is to be paid to her during her life, and at her death to revert to my children (naming all five), or the survivors and their heirs, in equal proportions; and the residue of my estates to remain in the hands of my executors *Robert Sheddon* and *John Goodrich* for the use of my children aforesaid, but with full power to pay each their equal proportions on or before they come of age. I mean all the residue of my estate to be for the use of my children, subject to the direction of *Robert Sheddon* and *John Goodrich*." The testator died soon after executing his codicil. The bill was filed by the executors for establishing the will, &c. The widow died before the hearing of the cause. By the Master's report it appeared, that at the date of both wills, the testator was seised in fee of estates in the county of *Bucks*, and in the island of *Bermuda*, and of which he died seised. That, as the island of *Bermuda* came into possession of the *English* in 1609, and was not named in the Statute of Frauds, it was not affected thereby; and the Master was therefore of opinion that the estates in *Bermuda* passed by the second will and codicil. Upon further directions, one of the questions was, whether, as the son and heir of the testator took benefit by the will and codicil, he should not be put to election, admitting that the real estate was to be considered as converted into personal. Lord *Eldon* decided that it was not a case of election. After observing that if he were at liberty to read the codicil as an instrument capable of disposing of real estate, there would be no doubt the testator's meaning was to give the whole property by these two last instruments, and referring to the case of *Carey v. Ashew* (*h*), he continued thus: "Lord *Kenyon* said the distinction was settled and not to be unsettled, that if a pecuniary legacy was bequeathed by an unattested will under an express condition to give up a real estate,

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(*h*) As accurately stated by Sir *Samuel*, then Mr. *Romilly*.

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by that unattested will attempted to be disposed of, such condition being expressed in the body of the will, it was a case of election, as he could not take the legacy without complying with the express condition. But Lord *Kenyon* also took it to be settled, as Lord *Hardwicke* has adjudged, that if there was nothing in the will but a mere devise of real estate, the will was not capable of being read as to that part; and unless, according to an express condition, the legacy was given, so that the testator said expressly the legatee should not take unless that condition were complied with, it was not a case of election. The reason of that distinction, if it were *res integra*, is questionable. It is more difficult to raise a question of election here; as in this case there is real estate that would answer any description of estate or land, that would pass without three witnesses; namely, the estate in *Bermuda*. But it is not necessary to attend to that distinction, for after the doctrine has been so long settled, though with Lord *Kenyon*, I think the distinction such as the mind cannot well fasten upon, it is better the law should be certain, than that every Judge should speculate upon improvements upon it."

Lord *Erskine*, C., in his judgment in *Thellusson v. Woodford*, upon the subject of this present division, says, "As to the case of a devise with two witnesses only, the intention is as plain as in *Noys v. Mordaunt* (i); why then should not the Court say in the former case, the intention is clear, but cannot as to the real estate have legal effect, from the omission of a third witness, by mistake; as in the other case, the deviser attempts through mistake to devise an estate, which is in settlement or belongs to another person? The opinion of Lord *Hardwicke* I take to be this: a devise of real estate is considered as a matter of so much solemnity and importance, that the law will not accept proof of the act without the evidence of three witnesses. If not so proved it is nothing; it cannot receive notice. The intention cannot be represented; for it cannot be presumed, and there is no evidence; the will not being executed with the solemnity prescribed by law as to real estate, cannot be read; the Court cannot see any devise of real estate; and therefore as the estate does not appear to be devised away from the heir, no act appearing to be done (k), the heir cannot be put to his election."

(i) *Supra*, p. 1567.

(k) As in the next case, the act does appear to be done.

We may notice here and distinguish from the preceding cases that of *Thellusson v. Woodford* (1). There *Peter Thellusson*, by will duly executed according to the statute, devised all his estates, manors, &c. in the county of *York*, and the messuages, &c. for the purchase whereof he had contracted, and all other his real estates, to the use of trustees, their heirs and assigns, upon trusts after mentioned. The will contained a clause directing that, in case he should in his lifetime enter into any contracts for the purchase of any lands, &c. and should happen to die before the necessary conveyances thereof were executed, all such contracts should be completed by his trustees after his death, and the purchase money paid out of his personal estate; and that the trustees and their heirs should stand seised of the lands, &c. when conveyed to them, to the uses, &c. by the will declared of the estates directed to be purchased with the residue of his personal estate. The testator within a month before his death had contracted for the purchase of real estates to the amount of 30,000*l*. The question was, whether the heir-at-law was entitled to the lands conveyed to the testator since making his will, and to have the contracts since entered into completed, and the purchase monies paid out of the personal estate, and conveyed to him absolutely; and whether he was entitled to take such estates, as well as the legacies and bequests in the will; or whether he might not be put to his election? Lord *Erskine* was of opinion that the heir must elect between these estates and the benefits by the will: in the course of his judgment observing, "In every case of election there must be an intention to dispose of that over which that person has no power of disposition. That is the circumstance that creates election. The testator, with this peculiar object, the application of his personal estate to the acquisition of great landed property, was not aware of the distinction between real and personal estate; and therefore conceived that under this direction of his will as to his future contracts for purchases, his trustees would be legally seised according to the uses of his will. As he had not the power to make that disposition, the heir takes those estates that cannot pass by the will; but the testator, not being aware of that, gives considerable interests to the heir, but gives those interests under the conception, that the whole property and arrangement was

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subject to his control; and upon that ground the principle of election must prevail" (*m*).

But where the intention to pass after purchased real estate is equivocal, the heir will not be bound to elect.

This was decided in the case of *Back v. Kett* (*n*), in which the testator desired his executors to sell whatever real estates he might die possessed of; the produce to be invested on certain trusts for the benefit of his children. After the date of his will, the testator purchased some real estates of considerable value, and acquired others by devise or descent. The question was, whether the eldest son and heir was bound to elect between the benefits given him by the will and the real estates subsequently acquired which descended upon him. For the plaintiffs, the younger children, *Thellusson v. Woodford*, last stated, was relied upon. But Sir *Thomas Plumer*, M. R., decided in favour of the heir, observing, "I have no doubt here. I think the case referred to has gone quite far enough. But there it was impossible to construe the will, without admitting that it applied to the matter in question. The words were unequivocal. I confess, however, that without such high authority, I should have entertained doubts in that case. But if it were to be carried further, the consequence would be, that wherever expressions like these (which are very common) are used, the heir must elect. The principle is, that the will is not to be construed as operating upon any property, but what he had at the time. Here there was a space of seven years, in the course of which he bought other estates. He may have bought them, not for the purpose of being sold again directly on his death, but in order that they might descend to his heir; and the heir is not to be disinherited except by express words. Now the direction is for his executors to sell all that he should die possessed of, that may mean all which the will could operate upon, that is, all which he then had, and which he should continue to have at his death. I cannot, therefore, think I should be warranted in extending it to after purchased lands, and putting the heir to his election" (*o*).

In the discussion of *Thellusson v. Woodford*, Sir *Samuel Romilly* put it as a doubtful point, whether the heir must elect where a legacy is given to him, and an estate to a stranger, and after the

(*m*) See also *Churchman v. Ireland*, 1 Russ. & M. 250.

(*n*) 1 Jacob. 534.

(*o*) See also *Johnson v. Telford*, 1 Russ. & M. 244, *infra*, sub-sect. 3, for another point.

will a recovery is suffered by the testator, whereby the will is revoked, and the estate descends to the heir; and he thought that the heir could not be put to his election; but Chief Baron *Alexander*, who was then counsel on the other side, thought it was a case of election, as was, he said, every case in which you can look at the will. Upon this, Sir *Edward Sugden* (o) observes, "The point, however, seems very doubtful; for, notwithstanding that the testator intended the estate to go to the devisee, yet the will being revoked as to the devise, although, by construction of law, there seems to be no equity attaching on the conscience of the heir." In answer to Sir *Edward Sugden*'s observation, it may be suggested, that, although it is true that the will is revoked, and inoperative as a devise of the land in question, as it was in the case of *Thellusson v. Woodford*, still, being executed according to the statute, the Court is at liberty to look into it, in order to discover the intention of the testator as to his real estate; and that intention, as Sir *Edward Sugden* admits, being clear, that the devisee should take the estate, lets in the doctrine of election, and the conscience of the heir is affected by the implied condition annexed to his legacy. The case above, put by Sir *Samuel Romilly*, bears a very close analogy to *Thellusson v. Woodford*, and the reasoning of Lord *Erskine* therein, seems very applicable to the former case.

Application of election.

To the heir at common law.

2. We next advert to the circumstance of the *invalidity* of the will, made before the first of *January*, 1838 (oo), as a disposition of real estate, on account of the want of capacity to devise, by reason of *infancy* or *coverture*.

2. Where the will is invalid by reason of the infancy or coverture of the testator.

Thus, in *Hearle v. Greenbank* (p), *William Worth*, in *August*, 1742, devised all his freehold, copyhold, real and leasehold estates to trustees, upon trust, to apply the rents for the sole and separate use, &c., of his daughter *Mary*, wife of *William Winsmore*, for life; and upon further trust, to permit her, by any deed or writing, to be executed in the presence of three or more witnesses (notwithstanding coverture), to give, devise, and bequeath all his said estates to such persons as she should think fit. He gave his residuary personal estate to the same trustees, in trust for his said daughter, to her separate use and disposal, &c.; and appointed his trustees, *Wood* and *Greenbank*, executors. Before and at the date of the will, Mrs. *Winsmore* lived apart from her husband, and in *December*, 1742, she died; having, prior to her death, and during infancy, attempted to execute the power of appointment

(o) Sugd. on Pow., ch. x., sect. v., div. 6, 2 vol. 147. Ed. 1845.

(p) 3 Atk. 695, 715; 1 Ves. sen. 298, S. P.

(oo) Sec. 1 Vict. c. 26, ss. 7, 8.

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election.

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common law.

given her by her father's will, over his whole real and personal estate, by a testamentary writing duly attested by three witnesses. By this instrument, she gave to her daughter *Mary* certain annuities, until she attained the age of twenty-one years, to be applied at the discretion of the executors, towards the education and maintenance of her daughter; she also gave her daughter 8,000*l.*, to be paid at twenty-one; but if she died under that age, without issue living at her death, to her cousins *Henry Worth* and *Francis Hearle*, equally. After giving several other legacies, the testatrix charged all the real and personal estate she was entitled to under her father's will, with the payment thereof, and appointed *Greenbank* and others joint executors, guardians, and trustees to her daughter, till twenty-one. She then gave all the residue of her real and personal estate to the plaintiffs absolutely, as tenants in common. Lord *Hardwicke*, C., having decided that the execution of the power, so far as regarded the real estate, was invalid from the circumstance of the infancy of the appointor; the question was, whether, as the daughter of Mrs. *Winsmore* was entitled to a considerable benefit under her mother's will, she should not elect between her right as heir, and the provisions of the will: but his Lordship decided she should not. For, the instrument being void as to real estate, there was no instance where an infant had in such a case been compelled to make an election; for properly there was no will at all as to the lands. "It is," continued his Lordship, "like the case, where a man executes a will in the presence of *two* witnesses only, and devises his real estate from his heir-at-law, and the personal estate to the heir; this is a good will as to personal estate; yet, for want of being executed according to the Statute of Frauds and Perjuries, is bad as to the real estate; and I should, in that case, be of opinion, that the devisee of the real estate could not compel the heir to make good the devise of the real estate, before he could entitle him to his personal legacy; because here is no will of real estate for want of proper form and ceremonies, required by the statute (*p*).

Coverture.

The principle of the last case equally applies, where the want of capacity to bequeath arises from *coverture*.

This was exemplified in the case of *Rich v. Cockell* (*q*), which, for the present purpose, was as follows: *Ann*, the wife of *William Cockell*, having a power of appointment over 500*l.* three *per cents*.

(*p*) See also *Woodford v. Thellusson*, 13 Ves. 223, *infra*, affirmed, D. P.
(*q*) 9 Ves. 370.

by will bequeathed the sum of 400*l.* which she had in the three *per cents.*, together with her *diamond clustered ring*, to the plaintiff; and gave the residue of her goods, &c., to her husband *William Cockell*. The plaintiff filed his bill for the 400*l.* and the *ring*. Letters of administration were granted to the plaintiff, of the wife's separate property only. Lord *Eldon* said, "as to the question of election, upon the *diamond ring*, there is a difficulty upon that. These letters of administration give no power to make any order, as to anything that is not proved as separate property. Therefore the will, as to that, has not been by due authority adjudged to be that species of instrument, which I can read as such. The plaintiff, therefore, is entitled to the 400*l.* stock, and has no right to anything else."

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To the heir at common law.

3. In the *third* place we observe, that where the will, made before the first of *January*, 1838 (*q*), though ineffectual for want of due execution, according to the Statute of Frauds (*qq*), contains an *express condition* that any of the legatees, who may not comply with the terms of it, shall forfeit their interests under its provisions, there the heir will be obliged to elect, by force of the condition annexed to the testamentary benefit.

3. Where the will is invalid as a devise of real estate, but contains an express condition that the legatees shall comply therewith.

Thus, in *Boughton v. Boughton* (*r*), — a freeman of *London*, devised his real estate to his younger son, *Stephen Boughton*, and all his personal estate among his children; he gave 1,200*l.* upon some contingencies, to *Grace*, the eldest daughter of his eldest son; then followed this clause, "If any child or children of mine, or any in their right, or any who may receive benefit by my will, shall any way litigate, dispute, or controvert the whole, or any part thereof, or the codicils thereto belonging, or not give such discharges as my will requires, or not comply with the whole and all and every condition and conditions therein contained, both as to real and personal estate, such child or children shall forfeit all claim and pretence whatever under my will, and shall have no more than the orphanage part of my personal estate I die possessed of; revoking what I give them, I give it to my residuary legatees, liable only to orphanage; my will being, that the contestor, not content with the whole will, shall account for all monies which I have advanced him or her." The testator annexed to this instrument an attestation in the common form, but it was not subscribed by him, nor by any witness. There was a codicil without date, but signed by him, which recited that,

(*q*) See 1 Vict. c. 26, s. 34.

(*qq*) 29 Car. 2, c. 3.

(*r*) 2 Ves. sen. 12, *infra*, sub-

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in further consideration of that his last will, he made a codicil thereto, and gave directions therein. *Grace*, by the death of her father, became heir-at-law to her grandfather, and thus entitled to whatever he left to descend, or which ought to descend through the invalidity of the will. She being an infant, the bill was filed by *Stephen*, in order that she might elect to take either the 1,200*l.* or the real estate. Lord *Hardwicke* was of opinion, she ought to elect; that the last codicil which was signed, by referring to the preceding instrument, obviated the difficulty about its want of signature. Yet, though those instruments were of force only to pass personal estate, nevertheless, if there were a *condition* annexed to a personal legacy, the Court must consider every part of that, whether it be a matter relating to real estate, or not; which made a substantial difference (*s*), and, while it would prevent any infringement upon the Statute of Frauds, would attain natural justice, which required, as far as might be, such construction being made, to support the testator's intention.

With respect to the *mode* of making the election, his Lordship said, "But there may be a difficulty how to carry it into execution; for, being an infant of tender years, she cannot judge for herself, nor can the Master judge for her, it being on several contingencies; so that, until she comes of age, no election can be made, till when the plaintiff must receive the rents and profits of the estate, subject to the further order of the Court; but must be restrained from committing waste. If the infant shall elect to have the land, then whatever the plaintiff shall be entitled to, as his orphanage part of the testator's personal estate, will be liable to make satisfaction for what he shall have received out of the rents and profits of the real as the Court shall direct." The propriety of this order is questioned by Mr. *Belt* in his supplement (*t*).

4. Where the
devise is inope-
rative as a de-
vise to the heir.

4. In the next place we consider, whether a devise, in a will duly executed, which is void as a devise to *the heir*, will put such heir to his election; an inquiry which can now only apply to wills of testators dying before the 1st of *January*, 1834; for by the 3 & 4 Wm. 4, c. 106, sect. 3, where lands are devised by the will of a testator, dying after the 31st of *December*, 1833, to the heir, he shall take as devisee, and not by descent.

(*s*) In reference to *Hearle v. rich, supra.*
Greenbank; see also 8 Ves. 496-7, (t) P. 262; see also 1 Swanst.
 per Lord Eldon, in *Sheddon v. Good-* 414.

The point has been doubted, but now seems well settled.

The first case is *Noys v. Mordaunt* (u), before stated.

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The next is an *anonymous* case in *Gilbert* (x). There A. seised of two acres, one in fee, the other in tail; and, having two sons, by his will devised the fee simple acre to his eldest son, who was issue in tail, and the tail acre to his youngest son, and died. The eldest son entered upon the tail acre. The youngest son filed his bill against his brother, either to have the tail acre, or else an equivalent out of the fee. Lord *Cowper*, C., said, this devise being designed as a provision for the younger son, the devise of the fee acre to the eldest son must be understood to be with a tacit condition, that he shall suffer the younger son to enjoy quietly, or else that the youngest son shall have an equivalent out of the fee acre; and decreed accordingly.

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common law.

In addition to *Thellusson v. Woodford*, before stated, the case of *Welby v. Welby* (y) confirms the preceding doctrine. There *William Welby* being seised, at the date of his will, and at his death, as tenant for life of estates at *Sapperton*, with remainder to his first and other sons in tail, and as tenant in tail male of estates at *Pointon*, and being seised in fee of other estates, devised the estates, of which he was seised in fee, to his son and heir, Sir *William Earle Welby* in fee; and devised the estates at *Sapperton* and *Pointon* to his said son, Sir *William Earle Welby*, for life, with remainder to his grandson, *William Earle Welby*, for life; with remainders over in strict settlement to his first and other sons in tail male. The grandson, *William Earle Welby*, the plaintiff, insisted that Sir *William Earle Welby*, his father, taking considerable benefits under the will, ought not to be permitted to disappoint the manifest intention of the testator; and that the estates at *Sapperton* and *Pointon* ought to be settled to the uses of the will. One of the questions was, whether, as heir, he was bound to elect; and Sir *William Grant* decided in the affirmative, observing, in the course of his judgment, "That an heir, to whom an estate is devised in fee, may be put to an election, although, by the rule of law, a devise in fee to an heir is inoperative, I should have thought perfectly clear, independently of Lord *Cowper*'s decision in the case in *Gilbert* (z): for, if the will is in other respects so framed as to raise a case of

(u) 2 Vern. 581; *Gilbert's Eq. Ca.* 2; see particularly the case put in the judgment by the Lord Keeper as reported by *Gilbert*.

(x) P. 15.

(y) 2 Ves. & Bea. 187.

(z) *Anonymous, ubi supra.*

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law.

election, then, not only is the estate given to the heir under an implied condition, that he shall confirm the whole of the will, but, in contemplation of equity, the testator means, in case the condition shall not be complied with, to give the disappointed devisees out of the estate, over which he had a power, a benefit correspondent to that of which they are deprived by such non-compliance. So that the devise is read as if it were to the heir absolutely, if he confirm the will; if not, then in trust for the disappointed devisees as to so much of the estate, given to him, as shall be equal in value to the estates intended for them."

2. To the heir
by custom.

2. *Secondly*, we proceed to consider the application of the doctrine of election to the *heir by custom*, as it affects wills made before the year 1838.

A very material distinction has existed, in the application of the doctrine of election, between the heir at common law and the heir by *custom*, where the will has been ineffectual as a devise of copyhold: and, for the better understanding of which, the reader is reminded that copyholds, not being held by socage tenure, were not within the enactments of the Statute of Wills, 32 Hen. 8, c. 1, and 34 & 35 ib. c. 5, which gave power to devise lands held by socage and of inheritance in fee simple; nor were they included in the Statute of Frauds (*b*); so that they were considered as passing by a will, not strictly as a will; but as an appointment of the use, under the previous surrender to the lord to the uses of the will. The will, therefore, neither required signature nor attestation, unless, under the terms of such previous surrender; and it was decided that any will received by the Ecclesiastical Court was sufficient to govern surrenders of copyhold (*c*).

While, therefore, the Courts could not look at the intention in a will of *freehold* estate, not duly attested according to the Statute of Frauds, yet with regard to *copyhold*, long before the recent Act, 55 Geo. 3, c. 192, relating to the devise of unsundered copyhold, the same obstacle did not arise; and accordingly we find that, notwithstanding the will, for a want of a previous surrender, was otherwise an ineffectual disposition of the copyholds, the Courts adverted to the terms of the devise as indicating the testator's intention, so far as to put the heir, upon whom the copyhold descended, to his election, between the customary right and the benefit given him by the will.

(*b*) 29 Car. 2.

Doe v. Danvers, 7 East, 299; 1 Jac.

(*c*) *Carey v. Ashew*, 2 Bro. C. C.

& Wal. 570; 1 Russ. 482.

59; *Roe v. Heyhoe*, 2 W. Bl. 1114;

But now the statute 1 Vict. c. 26, having prescribed uniformity of execution in wills of all kinds of property, the distinction above stated is now only applicable to wills made before the year 1838, and with reference to these only the following section (1) must be read.

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A further distinction was made between a *specific* devise of *copyhold*, and a devise in *general* words of all the testator's real estate, &c.: in the former case the heir was put to his election; but in the latter, the testator having *freehold* as well as copyhold estate, the general words would *not* be considered as sufficiently indicative of the intention to pass the copyhold, but were held satisfied by the freehold; and the heir was not compelled to make his election, unless in favour of *creditors*, where the devise was subject to payment of debts. But where the devise was in general terms, and the testator had *no* real estate except copyhold, there they would pass, and the heir was put to his election in favour of his wife, children, and creditors.

But now, by the 26th section of the above statute, a general devise of real estate will include copyhold and leasehold, notwithstanding the testator dies seised of freehold to satisfy the words; this latter distinction, therefore, can only have reference to wills not within the operation of the Act.

Where the heir is compellable to elect, if his election be in favour of his right under the will, then he must supply the want of surrender.

We proceed to the consideration of the cases in support of the preceding observations.

1. *First*, where no previous surrender has been made, and the will contains a *specific devise of copyhold*, in which case the heir is compellable to elect.

1. Where no previous surrender, and the will contains a specific devise of copyhold.

Thus, in *Unett v. Wilkes (e)*, Dr. *Wilkes* gave all his real and personal estate whatsoever to trustees, in trust to pay the rents and annual produce to his wife *Frances* for life; and in case she should think proper to dwell at *Willenhall*, at the house he then inhabited, to permit her to make use of his household goods, &c.; but if not, then, after giving her the power of selecting part of his effects, he directed that the rest should be converted into money, and laid out at interest; which interest his wife should receive during her life: and, after giving several pecuniary legacies, the testator directed his trustees to convey, transfer, and deliver

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to the plaintiff, who was his heir, all his real estate, and the residue of his personal estate, and settle it upon him and his heirs for ever. The testator, at the date of his will, and at his death, was seised of freehold estate of inheritance, of about 140*l.* annual value, and of copyhold of about 200*l.*; but did not surrender the latter to the use of his will. His mansion-house at *Willenhall* was copyhold. The plaintiff claimed the copyhold as heir-at-law, for want of a surrender; and also the freehold and personal estate in remainder under the devise. But Lord *Henley*, C. decided, that he must make his election, to take either as heir, or under the will; for, by claiming the copyhold, he would disappoint the testator's intention (*f*).

Again, in *Rumbold v. Rumbold* (*g*), Sir *Thomas Rumbold* devised all his estates, as well *copyhold* as freehold (declaring that the copyhold part thereof had been previously surrendered to the use of the will), whereof he was seised in fee (except *Walton* house and lands before specifically devised, and the next presentation to the living of *Walton Ashton*), to trustees, upon trust to sell, and invest the monies arising therefrom, and from the residue of his personal estate, in trust to pay his debts, &c.; and subject thereto upon several trusts for the benefit of his wife and children. The only trust in favour of his eldest son and heir, *George B. Rumbold*, was, to invest so much money in the funds as would produce the clear yearly sum of 300*l.*, and to pay the interest to his eldest son, *George B. Rumbold*, for life; after his death, to his wife for life; and, after the death of the survivor, for such son of *G. B. Rumbold* as should first attain twenty-one; and transfer the same with any savings out of the dividends not applied for maintenance; with several subsequent trusts: the testator's wife and the trustees were appointed executors. The testator died, leaving his wife, *George B. Rumbold*, and seven other children, surviving. The testator was entitled to copyholds of the value of 60*l.* annual value, of the manor of *Sacomb*, which he had not surrendered to the use of his will; nor had he been admitted. After his death, *George B. Rumbold*, his heir at common law and by custom, was admitted to the copyholds; obtained possession in ejectment, and mortgaged them for 700*l.*; and received a half-year's payment of the annuity under the will from

(*f*) See also *Macnamara v. Jones*,
1 Bro. C. C. 480, *supra*; *Frank v.*
Standish, Ib. 588; note, *supra*, p. 1517;
15 Ves. 391, n.; *Ardesoife v. Bennet*,

2 Dick. 463; *Allen v. Poulton*,
1 Ves. sen. 121; *Goodwyn v. Good-*
wyn, Ib. 226.

(*g*) 3 Ves. 65.

the trustees. The executors and all the younger children of the testator, except one, filed their bill against *George B. Rumbold*, his wife and children, the mortgagee, and the remaining younger child, praying that *George B. Rumbold* might be directed to supply the want of surrender, and be declared to have made his election, by acceptance of the half-year's payment of the annuity; and that the mortgage might be declared void as to the plaintiffs. *George B. Rumbold* claimed both the copyholds and annuity, but insisted that, if bound to elect, he was entitled to the fine for admittance, in case he elected to take the provision under the will. Lord *Loughborough*, C. held, that the testator meant to pass the copyholds in question, the description being a mistaken one; the testator supposing he had surrendered them; that the heir was bound to elect, and that if he took the annuity, then the trustees should pay off the mortgage, and apply to and retain the money arising from the annuity in their hands; and that the heir should be allowed the fines he had paid upon the admittance (*h*).

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The doctrine now under consideration was admitted at the Bar in *Blunt v. Clitherow* (*i*); the only question in that case being, whether the testator's intention was to devise estates surrendered and unsurrendered; for, if that were the case, there was no doubt upon the point of election, that the heir, taking under the will, must give effect to all its dispositions; and, consequently, must surrender.

In the case of *Strutt v. Finch* (*k*), the testator, *William Waltham*, devised all his freehold hereditaments, and also all and every his copyhold or customary messuages, &c. whatsoever and wheresoever, with their appurtenances, adding ("which I have surrendered to the use of this my will"), to trustees, upon trust to sell, &c., and invest the monies arising from such sale in the funds, or on real securities; and, out of the dividends, to pay annuities to his wife and daughters, and to his son *William Waltham*. The testator died seised of copyholds, part of which had, and part had not, been surrendered to the use of his will. *William Waltham*, the son and customary heir, devised the unsurrendered estate to his wife: and after his death, the question arose, whether the unsurrendered, as well as the surrendered

(*h*) *Pole v. Lord Somers*, 6 Ves. 309, S. P.; see also *Wilson v. Mount*, 3 Ib. 191; also *Pettiward v. Prescott*, 7 Ib. 541.

(*i*) 10 Ib. 593; see also *Kidney v. Coussmaker*, 12 Ib. 157.

(*k*) 2 Sim. & Stu. 229.

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copyholds, passed by the will of *William Waltham* the father? Sir *John Leach*, V. C., decided that they did: his Honor being of opinion, that the words in the parenthesis amounted to a mistaken affirmation respecting the subject of the gift, and that the expression was plainly affirmative, and not exceptive: the copulative "*and*" distinguishing the case from that of *Wilson v. Mount* (1); and his Honor decreed that the customary heir should elect.

2. Where no previous surrender and the devise is in general terms applicable to real estate.

2. We next consider the cases not within the above act, where there has not been any previous surrender, and the will makes *no specific mention of copyholds*, but devises in terms applicable to real estates *generally*. In such cases, the following distinctions seem to be established: that where the testator has not any other real estate to satisfy the words of the devise, except copyhold, there the general words will be considered sufficiently expressive of an intention to pass the copyhold, unless anything in the will appear to the contrary; and the heir will be compelled to elect between his right as heir and legatee under the will, as well in favour of the testator's wife and children, as of his creditors. But where the testator *has* freehold as well as copyhold, the general words of the devise of all his real estate will be considered satisfied by the freehold, and the words will not, of themselves, be held sufficiently expressive of an intention to pass the copyhold; and, consequently, the heir will not be put to his election, as between him and the widow and children of the testator: but the last rule admits of an exception in favour of the *creditors* of the testator: for, if the freehold is insufficient to pay the testator's debts, a devise in general terms of all the testator's real estates, subject to the payment of his debts, will be held to pass the copyholds; as the Court will presume that the testator meant to provide a fund sufficient to answer that purpose. Under this head we consider the cases:

1. Where the devise is in general terms and the testator has no other real estate besides copyhold.

First, where the devise does not mention copyhold, but is expressed in terms applicable to real estate *generally*, and there has been no previous surrender, and the testator has *not* any other real estate but copyhold. In such case, the general words will be considered equivalent to a specific devise of copyhold, unless a contrary intention appear.

In *Byas v. Byas* (m), Sir *John Strange*, M. R., says, "If the

(1) 3 Ves. 191.

(m) 2 Ves. sen. 164, 165, *infra*, p. 1613.

testator had none but copyhold, 'all my real estate' would have been sufficient to pass the copyhold, though no surrender had been made to the use of the will;" and he referred to a case before Lord *Talbot* in 1735, and the case of *Bethlehem Hospital*, 10th June, 1735, that "all my lands" could not pass copyhold lands not surrendered, if there were other lands to satisfy it; but if surrendered, that would explain the general words, and pass it.

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In the case of *Church v. Mundy* (n), *Hugh Mundy* the younger, being entitled to the reversionary interest in fee of copyhold estate, expectant upon the estate tail of his brother, *Charles Mundy*, by his will not duly executed according to the statute, gave and devised all such worldly estate and effects, that it might please God to bless him with, or he might leave or be entitled to at his decease, whether real or personal, to trustees, in trust for his wife during her life; and, in case she should die without issue, then, after her death, to release, assign, and convey his real and personal estate to his brother, *Charles Mundy*, his heirs, &c.; but, if he should die in the lifetime of the testator, or of the testator's wife, then to the appointment by will of the testator's wife. *Hugh Mundy*, the younger, died without issue in 1782, leaving his wife and brother surviving; and without having surrendered to the use of his will. *Charles Mundy* died in 1795, without issue, not having done any act to bar the entail. *Mary*, the widow of *Hugh Mundy* the younger, filed her bill, praying to be declared entitled, under the will of her late husband, to the reversion of the copyhold estates expectant upon the decease of *Charles Mundy* without issue. The fact of *Hugh Mundy*, the younger, having freehold that could be the subject of devise was disputed. The question was, whether the reversionary interest of the copyhold expectant upon the estate tail in *Charles Mundy*, passed by the will of *Hugh Mundy* the younger: and if not, whether the want of a surrender would be supplied in favour of the wife; which depended upon the point, whether, according to the construction of the will, the testator's intention was, that the copyhold should pass. Sir *William Grant* dismissed the bill, being of opinion, that independent of the consideration, whether there was or was not any freehold estate, to which the words could apply, it clearly appeared *not* to have been the intention of the testator to comprehend the reversionary interest in the copyhold, but only such an estate as his wife

(n) 12 Ver. 426.

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might first take for life, and *Charles Mundy* might enjoy afterwards, and that it was impossible the copyhold could be taken in that order.

The plaintiff in the above case appealed (o) from the decree pronounced at the Rolls, and Lord *Eldon* differed with Sir *William Grant* in his interpretation of the will, as expressive of an intention not to pass the copyhold; and intimated his opinion, that, if the testator had no freehold estate, the general expression in the will would be applicable to the copyhold. In the course of his judgment, his Lordship observed, "The best rule of construction is, that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary; and surely that is the safest course, where, as there is no other subject to which they can be applied, the testator must, if he does not mean that, be considered as having no meaning." A reference was made in the above case to inquire whether the testator had any freehold estate, so that the point does not appear to have been expressly decided.

2. Where the testator has freehold as well as copyhold: as between heir and testator's wife and children, no election.

Secondly, Where the testator *has* freehold, as well as copyhold; and *first*, where the question as to supplying the want of surrender is only between the customary *heir* and the *wife* and *children* of the testator; in which case the copyhold will not be held to pass, and consequently the heir will not be put to his election.

1. Thus in *Lindopp v. Eborall* (p), the testator devised all his messuages, lands, &c., and real estate whatsoever (not settled in jointure upon his wife), to trustees, upon trust to sell and pay his debts: and, subject thereto, to invest the surplus on government security, and pay the interest to his wife for life, and the principal to his daughter *Ann*, and the issue of her body, if she attained twenty-one; and in default, to his son, *Thomas Evetts*, in like manner; and in default, over. The question arose between *Ann*, the daughter, who had attained twenty-one, and *Mary*, the widow of *Thomas*, the son and heir-at-law of the testator, whether a small copyhold in *Pelsall*, not surrendered to the use of the will, passed thereby. But Lord *Thurlow* held, that it did not pass, for although, where the copyhold is necessary to pay debts, such necessity is held equivalent to a description of it, yet, in the principal case, it not being necessary for that

(o) 15 Ves. 396; see also *Wentworth v. Cox*, Mad. & Geld. 363.

(p) 3 Bro. C. C. 187, Belt's ed.

purpose, it should not pass for the further purpose of going to a younger child; that the Court had never extended that rule to a case where the question was, whether the wife or child should have more or less.

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Lord *Eldon* thus explains (*q*) Lord *Thurlow*'s meaning in the above case: "Where a testator intends to provide for his child, the Court cannot determine whether the provision shall be large or small, more or less; but can only say, that he does intend a provision for that child. If, therefore, there is a freehold estate that will answer the purpose of a provision, the Court has no means of ascertaining that he intended a larger provision: but where the Court regards a testator as proposing that his debts shall be paid, the amount of the debts must ascertain the value to be applied for that purpose; and, if the debts cannot be discharged by the freehold estate, the Court draws the inference that the testator meant to provide a fund, which would be sufficient to answer that, his purpose. In the one case, the parent intending to make a provision for his child, if that is done by the appropriation of a freehold estate, the extent of the provision being undefined, there is no reason for increasing it by the addition of the copyhold estate: in the other, the testator meaning that all his debts shall be paid, must be considered as intending to provide a fund sufficient to answer that his purpose and intention."

In *Byas v. Byas* (*r*), the testator, being seised of freehold and copyhold not surrendered to the use of his will, by his will, after directing the payment of all his just debts, devised all the rest and residue of his estate, real and personal, of what nature or kind soever, to his wife, her heirs, executors, administrators and assigns. Sir *John Strange*, M. R., dismissed the bill of the wife against the testator's youngest daughter and customary heir, to have the want of surrender supplied in her favour.

In *Judd v. Pratt* (*s*), *William Pratt*, after devising a freehold messuage in *Banbury* to *John Vigers* and *Ann* his wife, for their lives, gave and devised all the rest, residue and remainder of his real and personal estate and effects whatsoever and wheresoever, and also the freehold messuage before devised, after the death of the survivor of *John Vigers* and his wife, to trustees, their heirs, executors, administrators and assigns, upon trust to sell and convert the same into money; and thereout, in the first place,

(*q*) *Judd v. Pratt*, 15 Ves. 394.
(*r*) 2 Ves. sen. 164.

(*s*) 13 Ves. 168; confirmed 15
Ib. 390.

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election.

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pay his debts, and after payment thereof, to pay to his nephew, *William Pratt*, 500*l.* and other smaller sums among his nephews and nieces, children of *John Pratt*, his late brother; and the residue he gave among all his said nephews and nieces, in equal shares, with survivorship. Parts of the testator's copyholds, of which he died seised, were intermixed with his freehold, but the copyhold had not been surrendered to the use of his will. An inconsiderable part of the testator's freehold estates he had purchased after the date of his will. The trustees filed their bill against the eldest nephew and heir-at-law, and heir according to the custom (who had received his legacy of 500*l.* and a considerable sum as his share of the residue), praying, that he might be decreed to be put to his election, between his benefits under the will and his right as heir; and, if he elected to take the former, that he might be decreed to surrender to the plaintiffs. The heir insisted, that it was not the testator's intention to include the copyholds in the general devise, and that he ought not to be put to his election. Baron *Sutton*, Master *Simeon* and Master *Cox*, dismissed the bill, deciding that the intention was not so clearly marked as to put the heir to election, there being general words only which were satisfied by the freehold estate. From this judgment, there was an appeal to Lord *Eldon*, C., who confirmed the decree at the Rolls. After observing upon the cases of *Byas v. Byas*, and *Lindopp v. Eborall* before stated, and remarking, that the question was, whether the general words in the devise manifested the intention to pass the copyhold, his Lordship continued, "and the Courts have in all these cases said, that those words are not a sufficient indication of that purpose, except for the satisfaction of debts. It comes, therefore, to the same thing. If the intention is manifest, the surrender will be supplied; and the case of election arises: but the same authorities, that bind me to say, the intention is not manifest for the purpose of supplying the surrender, bind me also to say, it is not manifest for the purpose of raising a case of election."

It seems immaterial, whether the will is invalid to pass the freehold estates according to the Statute of Frauds. Thus in *Sampson v. Sampson* (t), the testator, by a will attested by two witnesses, gave the whole of his property to trustees, for his wife for life, with remainder to his eldest son, he paying an annuity of 50*l.* or the sum of 1,000*l.* to his other children. The bill of the eldest son filed against the youngest brother and heir, according

(t) 2 Ves. & Bea. 337.

to the custom, praying that he might be decreed to surrender the copyhold estates of which his father died seised, to the use of his will, was dismissed. Sir *John Leach*, in the course of his judgment, observed, "It is said, that, as this will, being attested by only two witnesses, can have no operation upon the freehold estate, therefore the copyhold shall pass, *ut res magis valeat*, and by analogy to those cases, where the term "land" has been held to comprise copyhold estate, there being no freehold: but here is no analogy to that case. The reason this will has no operation as to the freehold estate is, not from any defect of intention, but the positive rule, prescribed by the statute; which would have had equal effect, if the expression had been "freehold land." The result is, that the will being equally inoperative as to the freehold and the copyhold lands, each estate must descend to the heir according to law."

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2. But, in the *next* place, where in such wills the devise is in general terms, and the testator has freehold as well as copyhold, and subjects his real estates to the payment of his debts, and the question is, between *creditors* and the customary heir, the Courts will construe such general devise to pass the copyhold; for, if the freehold be insufficient for the purpose of satisfying the testator's debts, the Court will presume that the testator intended to provide a fund sufficient, and will accordingly compel the heir in such case to make his election.

Secus, as between heir and creditors.

The reader will have observed the above proposition distinctly recognised in the cases of *Lindopp v. Eborall*, *Byas v. Byas*, *Church v. Mundy*, *Judd v. Pratt*, before stated, and to which he is referred.

The rule was laid down in *Drake v. Robinson* (u). There, *William Berners* devised *all* his real estate, not comprised in his marriage settlement, to trustees and their heirs, for the payment of his debts. The testator was seised at the date of his will, and at his death, of freehold and copyhold lands, but had not surrendered the latter to the use of his will. Lord *Macclesfield*, C., decided that, if there were not an estate sufficient for the payment of debts, without the copyholds, they ought to pass, the expression being large enough, and the testator's first intention being to pay his debts. The last case was followed by those cited below (x). In the case of *Mallabar v. Mallabar* (y), the bill against the heir by custom for supplying the defect of a

(u) 1 P. Wms. 442.

Kidney v. Coussmaker, 12 Ves. 158.

(x) *Harris v. Ingledew*, 3 P. Wms.

(y) *Forr. Ca. Tem. Talb.* 78.

91; *Haselwood v. Pope*, Ib. 322;

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surrender was dismissed with costs, it being admitted that the testator's estate was more than sufficient for the payment of his debts, exclusive of the copyhold.

3. To the heir of heritable property in Scotland.

3. *Thirdly.* We next in order proceed to a case, shewing the application of the doctrine of election to an *heir entitled to heritable property in Scotland*, in which we find, that, being under the will a legatee of personal property in *England*, such heir will be obliged to elect.

Thus in *Brodie v. Barry* (x), the testator, by a will duly attested according to the Statute of Frauds, devised all his real estates in *England*, *Scotland*, or elsewhere, and all his personal estate to trustees, upon trust, for three years, to carry on his works; and, after the three years, to sell and convert the whole of his real and personal estate into money; and, subject to and in default of any appointment by the testator, to pay it equally among his nephews and nieces, share and share alike; the shares of his three married nieces to be for their separate use for life; with remainder to their respective children. The testator died without issue, and without having made any appointment; leaving the defendant, *Charles Brodie*, his grand-nephew and heir-at-law, and customary heir by the law of *England*, and the defendant *Betty Cock*, one of his married nieces mentioned in the will, heiress by the law of *Scotland*, of all his heritable property there. The will was not conformable to the solemnities required by the law of *Scotland*, to pass real estate and heritable property in that country; the other nephews and nieces filed their bill, contending that *Betty Cock* ought not to be permitted to take such heritable property in opposition to the will, and also a share in the real and personal estates of the testator, as one of his nieces. The defendants, *Brodie* and *Cock*, submitted they were not bound to elect; and as to the defendant, *David Cock*, as he took no interest under the will, the property being given to his wife's separate use, the question was, whether he could be called upon to make such election as to the estate for life, to which by the law of *Scotland*, he was entitled in the heritable property descending upon his wife. Sir *William Grant*, M. R., decided that the heir was bound to make election; and that the marital rights of the husband, who derived no benefit from that will, could not be affected by that election. In the course of an able judgment, his Honor observed, "As to the law of *England*, a will of land in *Scotland*, must be held analogous to that of copyhold

(x) 2 Ves. & Bea. 127.

estate in *England*; and the will is equally to be read against the heir. It was said, a will of copyhold estate may have some effect here upon the copyhold: that is, if there is a previous surrender; but then the estate does not pass by the will; which operates only as a declaration of the use. In that respect, there is no difference between a copyhold and land in *Scotland*; for if in *Scotland*, there be a conveyance previously executed, according to the proper feudal forms, the party may by will declare the use and trust, to which it shall enure. If the law of *Scotland* is resorted to as the rule, the case (a) alluded to determines, that the *English* will may be read against the *Scotch* heir, for the purpose of putting him to an election; that too, in the strongest case, that could occur; for the will is stated to have been made on death-bed; liable therefore to the double objection, first, that a will cannot affect land; and, secondly, that on death-bed no valid conveyance whatever could have been made: yet it was held, that, as the heir took benefits under that will, it was not competent to him to dispute any part of its operation.”

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In the above case of *Brodie v. Barry*, the *Scotch* estate was mentioned in the will, but in the later case of *Johnson v. Telford* (b), the testator made no reference to his *Scotch* estate, but merely used the general words, “all my real estate whatsoever,” &c.; and Sir *John Leach*, M. R., decided that the heir taking benefits under the will was not put to his election, as it could not be clearly collected from the general words used, that the testator meant to pass his *Scotch* estates.

4. *Fourthly*. The application of the doctrine of election to the widow entitled to dower. 4. To the widow.

The Court of Chancery has adopted a distinction between those classes of cases, which relate to the election of widows, between dower and provisions under the wills of their husbands, and the ordinary cases wherein the doctrine is applicable. The rule, as settled by modern decisions, requires, that in order to deprive a widow of dower by election, it must be shewn that the testator meant to exclude her from it; as, for instance, where there is an inconsistency between her claim of dower and the disposition to her by the will. The bequest to the widow of a pecuniary legacy, personal annuity, or other interest, merely affecting the personal assets of the testator, without any declaration that it shall be in bar of dower, does not raise the

(a) *Cunningham v. Gayner*.

(b) 1 Russ. & M. 244; see also *Allen v. Anderson*, 5 Hare, 163.

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election.

To the widow.

implication of intention on the part of the testator to exclude her legal right, because there is no inconsistency between it and the bequest (*b*). But where the testator devises to or in trust for his wife married before or upon the 1st of January, 1834, lands or rents out of lands in which she is dowable, a presumption arises from that circumstance (though not of itself sufficient), that the testator intended the testamentary gift should be taken in lieu of dower. Notwithstanding this circumstance, however, the intention may yet be doubtful; and, if so, the widow will not be put to her election. If, for instance, lands subject to dower were devised to be sold, and a legacy bequeathed to the widow, she would not be put to an election between her dower and the legacy, the former not being inconsistent with the devise of the lands, as the widow may consent to accept the value of her dower out of the purchase money.

But by the ninth section of the 3 & 4 Wm. 4, c. 105, the law is materially altered as regards widows married after the above day; for that section makes such a devise a bar of dower, unless a contrary intention shall appear by the will; so that now the *onus* of establishing her right both to dower and the testamentary provision rests with her. The tenth section of the act provides, that a bequest of personal estate to the widow, shall not prejudice the widow's right to dower, unless a contrary intention appear. In the discussion of the doctrine now in review, we shall consider,—

Instances
where widow
entitled to
dower and tes-
tamentary pro-
visions.

1. Where lands
subject to
dower are de-
vised.

1. The cases wherein, before the above statute, the intention to exclude the widow has not sufficiently appeared, and she has been held entitled both to her dower and the testamentary benefit under her husband's will: and herein, *first*, where the lands subject to dower are devised to the wife; and, *secondly*, where a rent-charge out of such lands is devised to her.

And, *first*, where the lands subject to dower are devised to the wife.

Thus in *Lawrence v. Lawrence* (*c*), the husband devised his manor of *Little Sherrington*, mansion-house, and lands of the annual value of 130*l.* to his wife, *durante viduitate*; with remainder, together with all his other lands, to trustees for a term of twenty-four years from his death, with remainders over. The trusts of the term were for payment of debts and legacies; and as a further provision for his wife, the testator directed that,

(*b*) *Strahan v. Sutton*, 3 Ves. 249;
Ayres v. Willis, 1 Ves. sen. 230.

(*c*) 2 Vern. 365; 3 Bro. P. C. 8vo
ed. 483.

after two years of the term were expired, his trustees should permit her to receive the rents of one of the farms of 60*l.* a year, and after five years of the term were elapsed, to permit her to receive the rents of another of the farms of 90*l.* a year, for the remainder of the term, so long as she continued a widow. He then gave her several pecuniary and specific legacies, and appointed her sole executrix. No mention was made in the will, that any of the above provisions were to be in satisfaction of dower. The widow proved the will, possessed the personal estate, and entered upon the lands devised to her. She afterwards recovered her dower at law, of the yearly value of 86*l.*, and the lands were duly assigned. Upon a bill by the remainderman, to be relieved against the judgment, Lord *Somers* was of opinion, that the testamentary dispositions to the widow were intended in satisfaction of her dower, which intention appeared from the manner in which he had disposed of his lands not limited to his wife for her life. This decree was reversed by Lord Keeper *Wright*, because, in his opinion, there was nothing in the will, which shewed a sufficiently clear intention, that the widow was meant to be excluded from her dower. This judgment was acquiesced in till after the death of the plaintiff, when *A. Lawrence*, the next remainderman, became entitled, who commenced his suit to be relieved against the judgment of dower, but Lord *Cowper* declined to alter, in that respect, Lord Keeper *Wright's* decree; upon which *Lawrence* appealed to the *House of Lords*, who confirmed Lord *Cowper's* decree, and consequently that of Lord Keeper *Wright*.

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election.

To the widow.

The reasons for the final judgment of the House of Lords appear to have been, that the devise to the widow of a part of the dowable estates, was consistent with her right to dower in the remainder, and that, notwithstanding the interests which were given her in the two farms, parcels of the lands not devised to her; because her acceptance of them might not of necessity defeat any of the trusts of the term vested in the trustees, since the remainder of the lands, after the assignment of dower, might be sufficient to pay the debts and legacies in aid of the personalty; hence the implication, that the testator intended, by his testamentary dispositions to his widow, to purchase her right to dower in the lands not given to her, was doubtful and conjectural, which is not sufficient to put the widow to her election between her legal right and the testamentary benefit.

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election.

To the widow.

The preceding case was followed by *Lemon v. Lemon* (d). There the husband devised part of his lands to his wife for life, without expressing that they were to be in lieu of dower, and the residue of his estates to his brother in fee. The part devised to the wife exceeded the value of her dower. The widow recovered her dower at law, to be relieved against which, the testator's brother filed his bill, but the bill was dismissed: Lord *Parker*, C., declaring, that the point was already determined by the House of Lords.

Again, in *Hitchin v. Hitchin* (e), *Samuel Hitchin*, the plaintiff's grandfather, made a mortgage for five hundred years, which was satisfied, and after his death assigned to *Sarah*, his widow, who was entitled to dower of his estate, and died, leaving *Gyles*, the plaintiff's father, his son and heir; who, being indebted, made his will, and devised several lands to his wife, *Sylvestra*, but did not express it to be in satisfaction of dower, and gave the residue of his lands to his executors, until his debts were paid. *Sylvestra* recovered dower at law, and 220*l.* damages; upon which the heir filed the bill to be relieved against the judgment, and the widow also filed her bill for a discovery of the profits, and removal of the term out of the way. The Lord Keeper, in delivering judgment, said, "*Sylvestra's* bill is only against the trustees of the father, to have an account of the real and personal estate, and to discharge the debts; you do not pretend but that a dowress is to be relieved against a satisfied mortgage, so she must in this case: you do not insist upon *Lady Radnor's* case to be against it. The heir must be relieved against the damages until the debts paid; let a Master see, whether sufficient was raised to pay the debts and defalcation out of the recovery; the devise is not to be looked upon as any recompense or bar of dower, but a voluntary gift."

In *French v. Davies* (f), the testator devised to trustees (his wife being one of them) all his freehold estates to sell; with a direction that the proceeds were to form part of his residuary personal estate. He then gave to her leasehold premises, and a variety of articles of household goods, &c., and a legacy of 100*l.*, with liberty to reside in his mansion-house; and if she declined to do so, he ordered it to be sold, and the money to be applied as the produce of his freehold estates. He also gave to his wife the interest of 2,000*l.* *durante viduitate*; but if she married, then

(d) 8 Vin. Ab. Devise, p. 366. pl.
45.

(e) Pre. Cha. 133.

(f) 2 Ves. jun. 572.

half of the principal was to fall into his residuary personal estate, and the interest of the other half was to be paid to her separate use. The trustees were also to permit her the enjoyment, during widowhood, of his plate, &c., which were to be sold after her death or marriage, and the proceeds applied as the produce of his freehold and leasehold estates. The testator then directed his trustees to place his *residuary* personal estate at interest, and to transfer one-eighth part of the capital to three of his adult children; and to apply the interest of the remainder for the support of his infant children till twenty-one or marriage; and then to transfer to them the capital. Benefit of survivorship was given amongst them, in the event of all of them, except one, dying before the residue could be ascertained, or their shares became payable; but if all of them died before the happening of either of those events, he gave the whole of his residuary estate to his *wife*; and *B.* and *C.* absolutely, in equal shares. The principal question was, whether the widow should be compelled to elect between the benefits given to her by the will and her dower out of the freehold estate, which was sold with her consent? Lord *Alvanley*, M. R., determined that she was entitled to dower, and also to the provisions made for her by the will; being of opinion, that none of the dispositions of the will raised an implication of clear intention in the testator to exclude his widow from dower. That her claim to dower did not disappoint any of the dispositions of the will, nor was it inconsistent with the testamentary benefits: and his Lordship observed, with reference to the direction for the sale, as the wife consented to take the value of her dower out of the purchase money, it would not have the effect of obstructing the sale, any more than the incumbrance of any stranger, and in regard to the husband's being ignorant of his wife's right to dower, that was not sufficient to put her to election, it must appear that he did know it, and meant to bar her; or that what she demanded was repugnant to the disposition.

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election.
To the widow.

In *Brown v. Parry* (g), the testator died seised of lands of which the defendant, his widow, was dowable. By his will he devised to his wife some particular estates for life, and bequeathed to her some parts of his personal estate, but did not add in bar of dower. The question was, whether by accepting the devise and bequests under the will of her husband, she was not barred

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election.

To the widow.

of her right to dower: and Lord *Thurlow*, C., held, that she clearly was not, for it was not her husband but the law that gave her dower; and what her husband gave her was an addition.

In *Strahan v. Sutton* (*h*), *Matthew Strahan* bequeathed to his wife, *Margaret*, twenty guineas for her immediate support and maintenance, and also an annuity of 30*l.* for life, provided she should so long continue his widow; and, after giving some legacies, directed the residue of his personal estate to be invested in the funds in trustees' names, in trust for his son, *George*, when he should attain twenty-one, with maintenance out of the annual produce in the meantime. The testator devised a freehold messuage then in his possession to his said son, *George*, in fee, the rents and profits to be applied towards his maintenance, &c. during minority: and the testator directed that, during his said son's minority, the house should not be let or occupied by two individuals he specified. By a codicil the testator gave his wife all his household goods, furniture, plate, &c., and all his stock in trade for her own use. The testator died seised in fee of the freehold messuage devised by his will, having no other freehold estate. The annual value of the messuage was 26*l.* The widow claiming her dower, the question was, whether that claim of dower was not inconsistent with the devise of the freehold messuage to the son; for, otherwise, it was admitted, the widow was entitled to both? It was suggested, that the clause respecting the letting was inconsistent with the widow's claim, if she were to insist that it should be set by metes and bounds. But Lord *Alvanley*, M. R., decided, that the widow was not barred of her dower by the devise; that she might take her dower out of the rents, and not by metes and bounds; and that it would be extravagant to suppose she would occupy a part of the house, in order to let it to the persons objected to by the testator.

The doctrine of the preceding cases is recognized and confirmed by *Birmingham v. Kirwan* (*i*), cited in a future page; and, with reference to the residue of the testator's real estates in that case not devised to his wife, may be classed among the preceding authorities (*j*).

In *Norcott v. Gordon* (*k*), the testator having freehold and

(*h*) 3 Ves. jun. 249.

(*i*) 2 Sch. & Lef. 444; see also Lord *Dorchester v. Earl of Effingham*, Coop. 319; also the case of *Inclendon v. Northcote*, 3 Atk. 433, wherein the interest devised to the widow

was reversionary.

(*j*) See also *Ellis v. Lewis*, 3 Hare, 310; *Holdich v. Holdich*, 2 Yo. & Coll. (C.), 18.

(*k*) 14 Sim. 258,

copyhold in fee, gave an annuity to his wife in lieu and satisfaction of "all dower and thirds or other claims and demands which she might otherwise have had upon his estate," and died intestate as to his real estate: the widow was his customary heir. Sir *L. Shadwell*, V. C., held she was not bound to elect between the annuity and the copyholds, but was entitled to both.

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We proceed in the *second* place to consider the effect of a devise by the husband to the widow, of a rent charged upon the land out of which she is dowable; the widow's title to dower not being affected by the 3 & 4 Wm. 4, c. 105.

Where rents, &c. devised to widow out of lands wherein she is dowable.

The cases are in some instances discordant, but, upon the whole, it seems to be established, that such a devise by the husband does not, of itself, sufficiently manifest the testator's intention, that by that gift his wife should be excluded from her legal right to dower out of the lands so charged, there being no inconsistency between the testamentary gift and legal right: for the widow may have her dower assigned out of one-third of the estate, and receive her annuity or rent-charge out of the other: so that such devise is at most only an equivocal intimation of the testator's intention.

The first case we notice is *Pitts v. Snowden* (*k*). There the husband devised to his widow an annuity of 50*l*. payable out of his copyhold and freehold messuages, with a clause of entry and distress; to be made good out of his personal estate; and, subject to the annuity, he gave his freehold messuages to his three children. Lord *Hardwicke* decided, that the widow was not bound to elect, but entitled to both her dower and the annuity. In this case the annuity was secured out of a mixed fund; a circumstance relied upon in some of the subsequent cases, as raising an inference in favour of the widow's claim: but, it is presumed she would have been equally entitled had the charge been confined to the freehold.

The next case is *Arnold v. Kempstead* (*l*), wherein the husband bequeathed to his wife two leasehold houses for life, also an annuity of 10*l*. out of the rents of his freehold estates, so long as she continued his widow; subject to the annuity, he devised the estates to his nephew, *John Arnold*, for life, with remainder to the plaintiff, *William Arnold*, in fee. There were no clauses of entry and distress; and, the widow being dowable out of the estates, the question arose, whether she would be entitled

(*k*) 1 Bro. C. C. 292, note.

(*l*) 2 Eden. 236; Ambl. 466, S. C.

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both to dower and the annuity likewise? Lord *Northington* decreed she ought to elect; observing, that it was the manifest intention of the testator to give this annuity in satisfaction of dower.

It is difficult, if not impossible, to reconcile the case last stated with that of *Pitts v. Snowden*. If the annuity in the one case is, as Lord *Northington* said, in contradiction to the will, it would seem to be equally inconsistent in the other.

The case next in order is *Villa Real v. Lord Galway* (m). There the husband devised to his wife an annuity of 200*l.* for life, with power of entry and distress; and, subject thereto, gave all his real and personal estates to trustees, to preserve contingent remainders of the real estate, &c., but to permit his daughter or her trustee, during her life, to receive the rents of *all* the premises for her benefit, and to *let* the same at the best rents without fines; with remainder to the heirs of her body, &c. Upon the question, whether the widow was entitled to dower, and also to the rent-charge, Lord *Camden*, C., decided, that the widow must elect between the two; being of opinion, that the dower would be inconsistent with the terms of the devise. The last case was determined upon its own peculiar circumstances; the daughter was to receive *all* the lands, and to demise the *whole* estate, &c.; and, if the widow had recovered one-third of the estate, the trustees could not permit the daughter or her trustee to receive *all* the estate, nor let the *whole* of it (n): so that this case cannot be considered as sanctioning that of *Arnold v. Kempstead*.

The case that followed is *Jones v. Collier* (o), in which the husband bequeathed to his wife, for life, his dwelling-house in *Chelsea*, household goods, &c.; and he charged all his freehold estate at *Chelsea* with an annuity of 40*l.* to be paid quarterly to his wife for life, with power to distrain for the arrears: he also charged the estate with a like annuity for his nephew *John Jones*, with a similar power of distress; and he then devised the premises, given to his wife for life, from her death, and also all his freehold estates so chargeable as aforesaid, and all other his real and personal estates, to trustees, until his grandniece *Mary Ann Jones* attained the age of twenty-five; and then to her absolutely. He directed his trustees to allow and apply the *surplus of the rents and profits* of his said estates, subject as aforesaid, for *Mary Ann*

(m) 1 Bro. C. C. 292, note; Ambl. 682, S. C.

Birmingham v. Kirwan, 2 Scho. & Lef. 453.

(n) Vide per Lord *Redesdale*,

(o) Ambl. 730.

Jones's maintenance and education, until she attained her above age. He then directed his trustees to complete a contract he had entered into for the sale of part of his estate, and to lay out the money to the same uses which he had limited of the lands by his will. Under these circumstances, Sir *Thomas Sewell*, M. R., decided, that the widow should elect between the benefits in the will and her dower. The reasons for his judgment appear to have been, that the testator supposed he had the estate entirely at his disposal, and so directed the disposition of the *surplus* of the rents as to exclude all idea of dower; and that, when he entered into the contract for sale, he considered himself having power to dispose of it free from dower. These reasons are by no means satisfactory; the dispositions of the will being quite consistent with an intention in the testator only to pass such interest, as he had power to dispose of, and no other, namely, two-thirds of the property. The inference of the intention from the contract is equally ambiguous; for he might have intended to sell subject to his wife's dower, or the widow might have concurred, receiving part of the purchase money.

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election.
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The case of *Pearson v. Pearson* (*p*) follows next in order. There the husband devised a house and ten acres of land to his son, subject to a rent-charge of 10*l.* a year to his wife for life, and of 5*l.* a year to his brother. Upon the bill of the widow for her dower and the annuity, the question arose, whether she was entitled to both? Lord *Loughborough* decided that she was; observing, that the gift of the annuity to the wife might be a bar of dower or not, according to the language of the will: but in the case before him, if the value of the lands was insufficient to satisfy the two annuities and the dower, it would be a proof it was intended to be a bar; otherwise there was nothing in the will to show such intention. A reference was made to the Master to inquire into the value of the lands, and, if it was not sufficient, the widow was to relinquish her dower.

This case is the first instance of such a reference, and was disapproved of by the Master of the Rolls in *French v. Davies* (*q*).

The next case is *Wake v. Wake* (*r*), which was decided by *Buller*, J., sitting for the Chancellor. There the husband devised all his estate and effects, upon trust (subject to an annuity or rent-charge of 35*l.* to his wife for life), for his son by a former

(*p*) 1 Bro. C. C. 292.

Ves. 385.

(*q*) 2 Ves. jun. 580; see also per Lord *Eldon*, in *Druce v. Denison*, 6

(*r*) 1 Ves. jun. 335; 3 Bro. C. C. 255, S. C.

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election.

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wife, whom he made one of his residuary legatees: and it was held that she was not entitled to both her annuity and dower. This case was little argued; neither were *Pitts v. Snowden*, nor *Pearson v. Pearson*, cited, but the authority of *Jones v. Collier* was relied on.

In *Foster v. Cook* (s), the husband, being seised of freehold estate, and possessed of leasehold and other personal property, devised and bequeathed all his real and personal estates to trustees, upon trust to pay his wife an annuity of 50*l.* during widowhood; but if she married again, to pay her an annuity of 30*l.* only. The testator desired his trustees to permit his wife to have the use of the mansion house, and such furniture therein as she should think proper, during her widowhood; and directed that the child, wherewith his wife was then pregnant, should be brought up by her until twelve years of age; and he further desired his trustees to improve and manage his real and personal estates in the best manner for the benefit of the child, in all needful support and maintenance. He then devised all his real and personal estate whatsoever to the child when he should attain twenty-five, charged with the payment of the annuity bequeathed to his wife; and he directed his trustees to possess themselves of all his estates and substance, and improve the same for the benefit of his child, and to pay his debts. One of the questions was, whether the wife should have her dower as well as the annuity; and Lord *Thurlow* decided that she should take both: observing, that dower was an inchoate right during coverture, which could not be taken from the wife, but by *express language*, or an inference which was irresistible, amounting to declaration *plain*. That upon mere conjecture and slight probability, as in this case, she should not lose her plain legal right; and his Lordship, therefore, decreed accordingly (t).

The last case is consistent with *Pitts v. Snowden* and *Pearson v. Pearson*, and, though in some respects it resembles *Villa Real v. Lord Galway*, it has not those particular circumstances in the devise, from which Lord *Camden* in the last case inferred the testator's intention to be inconsistent with the wife's right to dower, such as the direction, that his daughter was to receive *all* the lands and the trustees let the *whole* estate.

The case last stated is confirmed by that of *Greator v. Cary* (u). There the husband gave an annuity of 150*l.* to his

(s) 3 Bro. C. C. 347.

note, 3 Bro. C. C. 350.

(t) From Sir *J. Simeon's* MS.

(u) 6 Ves. 615.

widow, and so long as she should so continue, to be paid by his executors half-yearly out of the produce of his real and personal estate; which personal estate he directed might be placed out at interest, to assist his real estate in payment of the annuity, or so much of his personal estate as should be necessary for that purpose; and he desired the first payment of the said annuity should be made within six months after his decease. The testator then bequeathed to his wife his household goods, furniture, plate, &c.; and, in the event of her dying without leaving a child, he devised and bequeathed all the residue of his real and personal estate to his sister *Ann Baker* absolutely. Upon the bill of the widow, the question was, whether she was entitled to the annuity, and also her dower and freebench; and Lord *Alvanley*, M. R., decided that she was so entitled; being of opinion he could not distinguish the case from that of *Foster v. Cook*, observing that the question in all these cases is, whether the testator meant to give away his wife's dower, which he could not do directly. For it must be seen clearly that he meant to dispose, so that if she should claim dower, it would disappoint the will. It must appear that there is some repugnancy.

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The reader will have observed upon the preceding cases, that those of *Pitts v. Snowden*, *Pearson v. Pearson*, *Foster v. Cook*, and *Greator v. Cary* (w), support the proposition now under consideration: that the case of *Arnold v. Kempstead* is not to be reconciled with them; that *Villa Real v. Lord Galway* and *Jones v. Collier* negatived the widow's claim upon the peculiar wording of the wills, as sufficiently intimating the testator's intention to exclude it, while *Wake v. Wake* was decided by *Buller*, J., upon the authority of *Jones v. Collier*, which was no authority for the general proposition, that the annuity in itself was sufficient to bar the wife's right, but was, as before observed, decided upon its own peculiar circumstances.

Upon a review, therefore, of the authorities, taking also into consideration the bias of the Court of Chancery to favour the widow's claim, the rule may be considered established, that whether an annuity or rent-charge be given to the widow, out of the *particular estate* in which she is dowable, or out of that estate enumerated with other property, she will be entitled to both provisions; unless, in the first case, the estate is insufficient to pay the annuity and to meet the dower: from which circumstance,

(w) See also *Dowson v. Bell*, 1 Keen, 761; *Harrison v. Harrison*, Ib. 765.

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election.

To the widow.

the intention would be apparent, that her husband did not mean that she should be at liberty to enforce both her claims; and unless, in the second case, when, upon a consideration of the whole will, such an inconsistency appears between the provisions or limitations in it, and the right to dower, as to make the intention *manifest* and *indubitable*, that she was not to have the benefits intended for her by the will, together with her dower. Instances of such inconsistency will be adduced in the following section; and to which we next proceed in order.

2. Instances
where intention
to exclude
widow ap-
parent.

2. Where the intention to exclude the widow has been considered sufficiently apparent, from the terms of the will, and to the purposes of which it has been considered repugnant.

The first case we notice is *Gosling v. Warburton* (x). There the husband devised his land to his wife, till *P.* his daughter attained the age of nineteen years, and afterwards to *P.* in tail, remainder over in fee. He further devised that *P.* should pay, after her age of nineteen years, to his wife 12*l.* *per annum* in recompence of her dower; and, if she failed of payment, that his wife should have the land for her life. The wife, before *P.* attained nineteen, brought her writ of dower, and recovered a third part; and, after *P.* attained that age, entered for non-payment of the 12*l.* The question was, whether such entry was lawful; and it was adjudged not; for, having recovered a third part in dower, she should not have the rent by the will; it being against the intention of the testator she should have both. The judgment was affirmed upon appeal.

In *Boynton v. Boynton* (y), the husband, after giving to his wife for life his mansion-house, &c. and some legacies, devised to her an annuity of 1,000*l.* charged upon his real estates not bequeathed to her, and in lieu of dower; but this grant and the legacies were declared to be void if she married again, and in that event he gave her an annuity of 100*l.* similarly charged, "in full for every benefit and advantage which he meant should arise out of any of his real or personal estates, in case she should marry again." The widow, in an answer to a suit, elected to take her dower; and afterwards married; upon which a supplemental bill was filed, and she claimed, by her answer, both her dower and the annuity of 100*l.*, notwithstanding her prior election; but Lord *Thurlow* said, that the terms in which that annuity was given, were tantamount to express declaration, that

(x) Cro. Eliz. 128.

(y) 1 Bro. C. C. 445.

she should not have dower; and that, having married again, and elected her dower, she had no title to the annuity of 100*l.*; and he decreed accordingly.

Application of
election.

To the widow.

Again, in *Birmingham v. Kirwan* (z), *Nicholas Birmingham*, being seised in fee of considerable real estates, devised them to trustees, in trust, by sale or mortgage, or out of the rents and profits to pay debts, &c. in aid of his personal property; and as to his demesne of about one hundred and seventy acres, with his house, offices, and garden, to permit his wife to hold and enjoy them for her life, at the yearly rent of thirteen shillings for each acre of the demesne, exclusive of bog; she keeping the house, offices, and garden in perfect repair, and not to let them, except to the persons in remainder. The residue of his lands, subject to the payment of his debts and legacies as aforesaid, he devised to other persons. The testator was greatly indebted at his death to creditors by *elegit*, who took possession of the lands not devised to the widow. She also entered upon the demesne, house, &c. bequeathed to her for life, and afterwards recovered her dower at law out of the residue of the lands. The question was, whether, under the circumstances, she was entitled to any dower, and of what? Lord *Redesdale*, C., decided, in conformity with *Lawrence v. Lawrence*, and the other cases of that class before referred to, that the devise of part of the lands to the widow did not bar her right to dower of the remainder of them. But his Lordship was of opinion that, under the terms of the devise and the dispositions in the will, she could not claim dower in the house and demesne, and also the interest in them given to her by the will, since the enjoyment under the two titles was inconsistent under the circumstances of the case. His Lordship observed, “ the house and demesne are devised, with the rest of the estate, to trustees; that devise, taken simply, might be subject to the widow’s right of dower; but it is coupled with a direction, that she shall have the enjoyment of the house and demesne, paying a rent of 13*s.* *per acre*, which must be out of the whole. Then follow directions that she shall keep the house and demesne in repair, that she shall not alien except to the persons in remainder; directions which apply to the *whole* of the house and demesne, and could not be considered obligations on a person claiming title by dower. It was clearly, therefore, the intention of the testator, that the wife should enjoy the whole of the house and demesne, under a right created by the will, and

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To the widow.

not part of it, under a right which she had previously had, and part under the will. If she brought a writ of dower against the trustees, as devisees in respect of the house and demesne, and was to have a third part set out to her, they could not execute the trust reposed in them, of permitting her to enjoy the whole under the will, one-third being recovered from them; nor could they reserve an acreable rent on the whole, and of the rent to be reserved she could not have dower: so that she, admitting the right of the trustees to the whole (which she must do for the purpose of having the demise made to her under the will), must yet dispute their title as to one-third, if she claims dower of the house and demesne. If she had entered on the whole of the house and demesne under a lease from the trustees before suing her writ of dower, she must have demanded dower against her own title, and avoided the lease as to one-third. As to the house and demesne, therefore, the question seems clear." But his Lordship was of opinion, that there was not sufficient in the will to exclude her from dower out of the rest of the estate.

So in *Chalmers v. Storil* (a), the husband devised all his estates whatsoever to be equally divided amongst his wife and his two children, a son and a daughter; it being his intention to make no distinction in favour of the male, but that his daughter should have an equal share with his son of all his property. The testator further declared, that in the event of the children dying in the lifetime of his wife, she should enjoy their shares during her life. One of the questions was, whether the widow was entitled to dower out of the remainder of the property, not immediately devised to her. Sir *William Grant*, M. R., decreed that she was not; observing, "The testator directing all his real and personal estate to be *equally divided*, &c. the same equality is intended to take place in division of the real, as of the personal estate; which cannot be, if the widow first takes out of it her dower, and then a third of the remaining two-thirds."

The last case may be considered an authority for this proposition, that where the husband devises his freehold estates to his widow and others as tenants in common, without expressing that the devise is in bar of dower, the wife will not be entitled to her dower and the share of the remainder, but must make her election.

In the case of *Roberts v. Smith* (b), the testator gave gavelkind lands to his wife and two other persons, in trust, as to one moiety

(a) 2 Ves. & Bea. 222.

(b) 1 Sim. & Stu. 513.

for his wife during widowhood, for the maintenance of herself and her children of a former marriage; and as to the other moiety in trust for his children. It was held that the equal division of the income intended by the testator was inconsistent with the claim to dower, and that the widow, therefore, was bound to elect.

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To the widow.

In *Dickson v. Robinson* (c), the testator having given his real and personal estate to his widow, upon trust for the equal benefit of herself and children, it was held to be a case of election.

In *Miall v. Brain* (d), the testator devised all his real and personal property to trustees, upon trust as to part for his wife during widowhood, and upon further trust, out of the rents and produce of his real and personal estate, to pay her an annuity of 100*l.*, during widowhood, with a further annuity of 50*l.* if she should be *enceinte* at his decease: and upon further trust, among other things, to permit his daughter to use and occupy a freehold house, other part of his property, for her life, and upon other trusts therein mentioned. Sir *John Leach*, V. C., observed, that the testator contemplated for his daughter the personal use and occupation of that house, which was inconsistent with the widow's claim to dower out of that part of the property. The house was part of a general devise, and the testator had not given it to the trustees free from dower, unless he had so given the rest of his estate. The testator had shown a plain intention, that the trustees should take such an interest in the house, as would exclude the wife's dower; and the same intention must apply to the whole estate passing by the same devise.

So in *Butcher v. Kemp* (e), the testator having devised a freehold farm to trustees for the benefit of his daughter, with directions to them to carry on the business of the farm, or let it on lease, during the daughter's minority, Sir *John Leach*, V. C., held this to be sufficient proof of an intention to exclude the wife from dower.

In *Reynolds v. Torin* (f), General *Reynolds* bequeathed to his wife during her life four-sevenths of the income of his general residuary estate. In the schedule referred to in the will was a debt due from a Mr. *Simson*, of 26,000*l.* secured on a heritable bond in *Scotch* form, charging lands in *Scotland*, and which

(c) Rolls, 30th April, 1822, stated division discussed.
by Mr. Jacob, in his edition of Mr. (d) 4 Mad. 119.
Roper's Treatise on the Law of (e) 5 Mad. 61.
Husband and Wife, where the reader (f) 1 Russ. 129.
will find the cases in the present

Application of
election.

To the widow.

according to the *Scotch* law did not pass by the will. The widow by the law of *Scotland* was entitled to a *terce* or third part in the sum secured; and the question was, whether she should be put to her election between her *terce* and the benefits under the will? Lord *Gifford*, M. R., decided she should, being of opinion that the testator, having given her interest of four-sevenths of the produce of his whole property, and meaning to include the interest of four-sevenths of the 26,000*l.* could not have intended to give her both four-sevenths and one-third of the yearly interest of the land.

The case of *Roadley v. Dixon* (g), in some important particulars resembles the cases of *Villa Real v. Lord Galway* (h), *Jones v. Collier* (i), and *Miall v. Brain* (k). The testator gave an annuity to his wife for life, charged on his estate at *Searlby*, with powers of entry and distress, also the life interest in the sum of 4,000*l.* charged with other legacies and an annuity upon the same estate, in aid of his personal estate. The testator then gave his wife, during the minority of his son, *R. D. Roadley*, the use of his dwelling-house at *Searlby* rent free. He then devised his estate at *Searlby*, and all other his real and personal estate, to trustees upon trust out of the rents and annual produce to pay competent sums for the maintenance and education of his son: and upon trust, during the minority of his son, to manage the farm then in the testator's possession, and let or manage the *residue* of his real estates, and receive and take the rents of the *whole* of his said real estates, and the annual produce of his personal estate, and lay out the same for the purpose of accumulation for the benefit of his son; and subject to annuities, debts, and legacies, bequeathed by his will, the testator gave all his said real and personal estate, and the accumulations, to his son absolutely. The estate at *Searlby* consisted of a mansion-house and about 1,080 acres of land, of which about 943 were in the testator's occupation at the time of his death. The widow claimed dower out of all the real estates of the testator, in addition to the benefits given by the will. Against this claim it was contended, that the gift of the rent-charge was inconsistent with the widow's right to dower, which would withdraw a great part of the property from the operation of the will, and that she was bound to elect between the testamentary benefits and her right to dower. Lord *Lyndhurst*, C., decided accordingly:

(g) 3 Russ. 192; see also *Reynard v. Spence*, 4 Beav. 103; *Hall v. Hill*, 1 Dr. & W. 94; *Taylor v. Taylor*, 1 Yo. & Coll. (C.), 727; *O'Hara v. Chaine*, 1 J. & Lat. 662; *Lowes v. Lowes*, 10 Jur. 453.
(h) *Supra*, p. 1624.
(i) *Supra*, p. 1624.
(k) *Supra*, p. 1631.

his Lordship observed, that he did not mean thereby to say, that a mere charge of annuity in the widow's favour, with a clause of entry and distress, was sufficient to put her to election: but, coupling that with the particular dispositions of his property, the express direction for the occupation of part of the estate by the trustees, and the trusts declared with respect to the rents of the *whole* of the real estate, his Lordship thought the testator's intention manifest, that the whole of his property should be free from dower.

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election.
To the widow.

But where the widow is bound to elect between her rights under her marriage settlement, and testamentary benefits given by her husband, her acceptance of those benefits will not preclude her from claiming a leasehold estate, part of her own fortune, which her husband was bound to renew in the names of the trustees of the settlement, but which he renewed in his own name (*l*).

Connected in some measure with the doctrine now under consideration, is the right of the widow to elect between her dower and provisions made by a settlement *after* marriage; but as it does not fall within the professed object of the present work, and the subject is discussed at length in Mr. *Roper's* Treatise on the Law of Husband and Wife, the reader is referred to that work, wherein he will find the law upon the point stated with that author's accustomed accuracy.

3. We proceed to consider the application of the doctrine of election to the widow, where she takes a testamentary provision expressly given in lieu of dower and thirds out of the real and personal estate, and claims a distributive share, as one of the next of kin, to an undisposed of portion of the residue of the testator's personal estate.

3. Where the
testamentary
provision is ex-
pressly given in
lieu of dower,
or when the
widow claims
as next of kin.

The law upon this subject is now settled in favour of the widow's claim as next of kin, and is thus stated by Lord *Alvanley*, in *Pickering v. Lord Stamford* (*m*). Where the testator has given to his wife that provision, which he meant to be a satisfaction for any claim she might have against the other objects of his bounty, if by any accident those objects should be unable to claim the benefit of that exclusion, no other person shall set it up against the widow.

The first case is that of *Simpson v. Hornsby* and *Hutton v. Simpson* (*n*), cited by Lord *Alvanley*, in the above case, and by which

(*l*) *Coleman v. Jones*, 3 Russ. 312. 185; 2 Eq. Ca. Abr. 439; 2 Vern.

(*m*) Next page.

722; Cited 3 Ves. 335.

(*n*) 1716 Mich. 3 Geo. 1; 11 Vin.

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election.

To the widow.

his decision was ultimately governed. His Lordship thus states the case. *Thomas Addison*, by his will, reciting that he had once intended to have made his daughter *Jane* co-heiress and equal sharer with his other daughter, but having married without his consent, he gave her certain provisions out of his real and personal estate; all which estates, leases, tithes, and money, before devised to his daughter *Jane* and her issue, were thereby declared to be in satisfaction of her child's part, of whatsoever more she might have expected from him, or out of his personal estate. He then devised to his wife; and gave her furniture and other things, all which devises and bequests he declared to be in full of her dower, thirds, and other claim at law or in equity, or by any local custom to any other part of his real or personal estate. He gave the residue to his other daughter, who died in his lifetime, leaving one child; who was the only person that could be entitled under the Statute of Distributions, besides the wife and the excluded daughter. By a codicil, he gave the residue to his wife for life, with power to dispose of the same after her decease, with the approbation of the trustees. Having this limited power, she made a disposition without the consent of the trustees. The decree declares that *Frances* the widow, having disposed without the consent of the trustees, had not pursued her power; therefore the testator died intestate as to the residue; which ought to go according to the Statute of Distributions, viz. in thirds; one-third to the plaintiff *Simpson* in right of his wife *Jane*; one-third to the child of the deceased daughter; and one-third to the devisee of the widow.

In the case of *Pickering v. Stamford* (o), the testator by his will gave certain parts of his real and personal estate to his wife, declaring that the provision thereby made, should be in lieu of dower or thirds, which his wife could claim in, to, or out of his real or personal estate, or either of them. By a codicil, the testator bequeathed all the residue of his personal estate in certain townships to his executors, for such charitable purposes as they should think fit. A bill was filed by one of the representatives of the next of kin, insisting that a considerable part of the personal estate consisted of real securities, and that the bequest was void by the Statute of *Mortmain*; and, therefore, prayed that it might be declared distributable among the next of kin, and that the provision made for the widow should be declared to have been accepted by her in satisfaction of her dower and thirds out of

(o) 2 Ves. jun. 272, 581; 3 Ib. 332, 493.

the real and personal estate. But Lord *Alvanley*, after much consideration, reversed his first decree, in favour of the next of kin, to the exclusion of the widow; and ultimately decided, that so much of the residue of the testator's personal estate, as was vested in real securities, was divisible according to the Statute of Distributions, viz. one-half to the widow, the other to the next of kin. In the course of his judgment, his Lordship observed, "The difficulty seems to be this: supposing the testator had said the same as to his next of kin, that imagining they had some customary share, and acting upon that, he had said the disposition to them should be a satisfaction for their shares; what could the Court have done? Must they have said, it should be the same, as if he had died without leaving any person who could take? The Court must have let them in, and could not have excluded the widow; and Lord *Cowper* (p), thought it something analogous to that."

Application of election.

To married women.

We may here observe that a rent-charge, limited by settlement on the marriage of the testator to his wife, which was expressly declared to be for her jointure, and in lieu of dower and thirds at common law will not exclude her from a distributive share of her husband's personal estate undisposed of (q).

Fifthly. Of the application of the doctrine of election to married women.

5. To married women.

First, as to the *mode*, in which their election is to be declared; and secondly, as to the *effect* of the election when made.

1. As to the *mode* in which the election is to be declared. Upon this the practice has varied. In *Parsons v. Dunne* (r), Lord *Hardwicke* held that a married daughter of a freeman of *London*, could not make her election between her share of her father's personal estate, under his will or by custom, without appearing in Court, or before persons named as commissioners, in case she were resident abroad.

1. As to the mode of declaring election by them.

In some cases the married woman is called upon by the Court to make her own election; sometimes in one mode, and sometimes in another; in others, reference is made to the Master, to consider which of the two interests is most for her benefit. Thus

(p) In *Sympson v. Hornsby*, and *Hutton v. Sympson*, *supra*.

(r) 2 Ves. sen. 60; Belt's Suppl. 291.

(q) *Colleton v. Garth*, 6 Sim. 19.

Application of
election.

To married
women.

in *Pulteney v. Lord Darlington* (*s*), Mrs. *Pulteney* was ordered, within a specified time, to make her election, by signing the registrar's book: which not being done, a reference was made to the Master, to inquire which was most for her benefit, and the election was made according to his report.

Again, in *Vane v. Dungannon* (*t*), Lady *Charlotte Kerr*, a *feme covert*, was ordered to elect before the Master within six months.

In other cases, where the value of the two conflicting interests is obvious, the Court will decide the question of election, without a reference to the Master (*u*).

Other acts have been considered to constitute election, besides those made in a suit for the purpose. Thus in *Stratford v. Powell* (*v*), a widow, bound to elect under her first husband's will, having upon a second marriage, settled her property to *her separate use*, was held to have made her election by acts done during her second coverture.

Again; receipt, by a *feme covert*, during five years, of interest of a legacy given to her separate use, by a will affecting to devise away a real estate to which she was entitled, was held to have constituted an election (*w*).

So, where a married woman concurs with her husband in selling any part of real estate, in respect of which she was bound to elect, such sale will, it is conceived, constitute her election. The decree in the case of *Brodie v. Barry* (*x*), seems to justify the last observation, as appears from the Registrar's book, from which the following extract is made: "His Honor declared that *Betty Cock*, in case she had not elected, was bound to elect between her heritable property and the provisions under the will; and it was referred to the Master to inquire and state to the Court, whether the defendant, *David Cock* and his wife, had sold any, and what parts of the Scotch heritable estate of the testator, and whether they had done any other acts in respect thereof, or affecting the same. The Master was to make a separate report as to such lastly mentioned inquiry, and it was declared that, in case the said *Betty Cock* had not already

(*s*) 7 Bro. P. C. ed.; Toml. 546, 547; see *Cavan v. Pulteney*, *infra*; 2 Ves. jun. 560, 696; 3 Ib. 385; see also 9 Ib., 350.

(*t*) 2 Scho. & Lef. 133.

(*u*) *Wilson v. Lord Townshend*, 2 Ves. jun. 693.

(*v*) 1 Ball & Beat. 24.

(*w*) *Ardesoife v. Bennet*, 2 Dick. 463.

(*x*) 2 Vea. & Bea. 127; Reg. Lib. A. 1812, fo. 1437; see also *infra*, *Lewis v. King*, 2 Bro. C. C. 600; Vol. I. Husband and Wife, 2d. ed. note p. 29.

elected, she ought not to be compelled to make such election as aforesaid, until the Master should have made his report, as to such last mentioned inquiry, and the further order of the Court."

Application of election.

To married women.

Where the funds are not settled to the separate use of a married woman, it should seem that acts *in pais*, done during coverture, will not be a valid election (y).

Neither can the election of a married woman in reference to her reversionary choses in action be carried into effect against the dissent of her husband.

This was decided in *Wall v. Wall* (z), in that case the wife was entitled under the marriage settlement of her parents to a reversionary interest in a fund subject to the life interest of her mother. Her father by his will directed his trustees to invest 18,000*l.* on security, and pay the interest to his daughter for her separate use for life, with a clause against anticipation, and with remainder to her children. The testator declared that the provisions he made by his will should be taken in full discharge of those of the settlement, and that upon request effectual releases should be executed. A bill was filed for carrying the trusts of the will into execution, and to compel the daughter and her husband to elect. The Master reported that it would be more for the benefit of the daughter to take under the will. The daughter in her answer submitted to take accordingly, but the husband submitted that he was not bound to elect, and could not be bound by the election of his wife. Sir *L. Shadwell*, V. C., held that, the interest under the settlement being a reversionary, chose in action of the daughter, could not be released or assigned; and that an election in accordance with the Master's report could not be carried into effect, against the dissent of the husband in a suit where husband and wife were co-defendants.

In the case of a married woman dying without having made election, it was intimated in *Stratford v. Powell* (a), by the Master of the Rolls, that a reference might be made to inquire which would have been most to her advantage.

The reader is here referred to two valuable notes upon the subject of the present section, one of Mr. *Swanston* in his

(y) *Parsons v. Dunne*, 2 Ves. 60; Ves. jun. 693.

Oldham v. Hughes, 2 Atk. 452; (z) 11 Jur. 403.

Cunningham v. Moody, 1 Ves. sen. 174; see also *Wilson v. Townsend*, 2 (a) Ball 1 & Beat. 25, *infra*.

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election.

To married
women.

Justice *De Grey*. But the case of *Brodie v. Barry* (*f*), appears to contradict it expressly, so far as regards the rights of the husband; and, it is to be presumed inferentially, in respect of those of the issue, though the point did not arise. In that case the wife being entitled as heir to heritable property in *Scotland*, and a legatee under a will affecting to devise, but inoperative to pass, the heritable estate, was put to her election, between her right as heir and legatee, in analogy to the cases of copyhold in *England*; and Sir *William Grant* decided that the marital rights of the husband could not be affected by the wife's election, as he took no benefit by the will.

Upon this subject it has been very plausibly suggested (*g*), that a distinction may prevail between those cases, where the property proposed to be relinquished by the wife consists of a legacy or trust fund of a personal nature, and those where it consists of real estate: and upon this principle; that in the former the right of the husband is not absolute, but subject to the control of the Court to apply the whole, or a part of the fund according to circumstances, for the benefit of the wife and her children; but that in the latter species of property, the husband's right, which the law confers upon him, is not subject to any such equitable qualifications: and as the wife cannot alone convey her real estate, so neither without her husband's concurrence, can she carry into effect the relinquishment of that real estate which she elects to give up; and it is conceived difficult to discover the principle, upon which that election would authorize the Court to compel him to convey away the legal interest vested in him.

With respect to the question, whether the *issue* would be barred by the election of the tenant in tail, it is presumed that upon principle they would not, without a fine or recovery (*h*), or by a conveyance in conformity with the requirements of the 3 & 4 *Wm.* 4, c. 74.

Where, however, the benefits given by the will, which imposes upon the tenant in tail the necessity of electing, happen to devolve upon the issue, the latter will be bound to elect (*i*).

6. To infants.

Sixthly. Of the application of the doctrine of election to persons under the disability of *infancy*.

(*f*) 2 Ves. & Bea. 127; *supra*, p. 1616.

(*g*) By Mr. Jacob, in a note to his edition of Roper's Treatise of Husband and Wife, vol 1, p. 30.

(*h*) *Long v. Long*, 5 Ves. 447; *Highway v. Banner*, 1 Bro. C. C. 586; *Roundell v. Curren*, 2 Bro. C. C. 67; 1 Swanst. 383, n.

(*i*) *Noys v. Mordaunt*, 2 Vern. 581.

Election on the part of an *adult*, may be compelled by a direction of the Court of Chancery, that if he neglects or refuses to signify his election within a limited time, he shall be understood as electing to abide by his rights paramount the instrument which imposes the obligation to elect (j). Application of election.
To infants.

But in the case of election on the part of *infants*, the practice of the Court has varied, as in the case of coverture.

In some instances the Court has decreed a suspension of the election, until the infant came of age. In another instance, a provisional election was made by the guardian of the infant in the meantime. In other cases a reference has been directed to the Master to inquire which would be most for the infant's benefit, and the decree has been made upon the Master's report.

In another instance, where the infant was to elect between two sums, one payable at eighteen or marriage, the other at twenty-one or marriage, the Court decreed that the infant should elect at eighteen.

Boughton v. Boughton (k) is an instance of the suspension of election until the infant came of age. There a freeman of *London*, by will not duly executed, affected to give real estate to his younger son *Stephen*: and among other dispositions, bequeathed 1,200*l.* upon some contingencies, to *Grace*, the daughter of his eldest son, and who became the testator's heir-at-law. The will contained an express condition, that any child disputing the will should forfeit all claim under it. Lord *Hardwicke* held, that as the infant could not judge for herself, nor the Master for her, the legacy being on several contingencies, no election could be made until she came of age; until which time the devisee should take the rents, subject to the further order of the Court; but that he must be restrained from waste. If the infant should elect to take the land, then the devisee's orphanage part of the testator's personal estate would be liable to make satisfaction for what he had received out of the rents.

In *Bor v. Bor* (l), the election was also suspended during minority; but with this difference, that in the meantime the infant's guardian should make election between the devised and descended estates. The Lord Chancellor in *Ireland* decreed, that

(j) See the decree in *Streatfield v. Streatfield*, from the registrar's book, reported in 1 Swanst. 447, note; *Ib.* 383.

(k) 2 Ves. sen. 12, and *Belt's*

Supplement, 259; and 2 Ves. jun. 697; and see *Thomas v. Gyles*, 2 Vern. 232; and 1 Swanst. 414, n. *supra*, p. 1603.

(l) 3 Bro. Par. Ca. ed. Toml. 173.

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election.

To infants.

the infant should have six months after he attained the age of twenty-one years to elect, and should, in the meantime, receive the rents and profits of the devised or descended estates, at the election of his guardian, without prejudice and subject to the order of the Court.

In *Streatfield v. Streatfield* (*m*), Lord Talbot directed the infant, within six months after he came of age, to elect between his interest as tenant in tail under a settlement, and that devised by his grandfather's will.

So in *Hervey v. Desbouverie* (*n*), the same Judge suspended the election of an infant daughter of a freeman of London to take by the will or the custom, until she attained twenty-one or married.

In *Rushout v. Rushout* (*o*), Lord Cowper, C., decreed that an infant bound to elect between two sums, one payable at the age of eighteen or marriage, the other at the age of twenty-one or marriage, should make her election at the age of eighteen: which she accordingly did, electing to take the latter sum; and the decree was affirmed by the House of Lords.

In *Chetwynd v. Fleetwood* (*p*), a reference was made to the Master. In that case, an infant heir was under obligation to elect, either to provide for the payment of a sum of money under the covenant of his ancestor, or to convey estates; which, in consideration of the payment of that sum had been settled on him: and Lord Talbot, C., directed a reference to the Master, to inquire which would be most beneficial to the infant; and on the Master's report, he decreed payment of the sum; and his decree was afterwards affirmed in the House of Lords.

In *Goodwyn v. Goodwyn* (*q*), a similar reference was made; and again in *Bigland v. Huddleston* (*r*), and in *Gretton v. Haward* (*s*).

7 To creditors.

Seventhly. Of the application of the doctrine of election to creditors.

The doctrine of election is not applicable to the case of creditors provided for by a general charge for the payment of debts; so that, although the exertion of their rights under such

(*m*) Ca. Tem. Tal. 176; and 1 Swanst. 447.

(*n*) Ca. Tem. Tal. 130.

(*o*) 6 Bro. Par. Ca. ed. Toml. 89.

(*p*) 1 Bro. Par. Ca. ed. Toml. 300;
2 Scho. & Lef. 266.

(*q*) 1 Ves. sen. 228.

(*r*) 3 Bro. C. O. 235, n.; see also Mr. Swanston's valuable note upon the subject of the present sect. Vol. 1, p. 413.

(*s*) 1 Swanst. 412.

a charge might affect other dispositions in the will, the creditors will not be prevented from so doing, under a suggestion, that, as they claim a benefit under the will, they ought not to disappoint any specific dispositions made by it.

Application of
election.

To creditors.

Thus, in *Kidney v. Coussmaker* (t), *Benjamin Kidney* devised all his real estates, except that afterwards devised to his wife for life, to trustees upon trust to sell, and apply the monies produced by such sale, first, to discharge all principal money and interest due to any person upon mortgage, or other incumbrances affecting the same estate at his death; and, subject thereto, upon the trusts after declared of the residue of his personal estate. He then devised several messuages in *London* to his wife for life, and after her decease to his two daughters; and, after other bequests, declared that the provision made by his settlement and will should be in lieu of the dower or thirds of his wife out of the freehold, copyhold, or customary estates. He then bequeathed the residue of his personal estate to trustees, upon trust, after payment of his debts, &c., to pay so much of the produce thereof as would, together with the rents, &c., of the messuages before devised, make up the annual sum of 400*l.* a year to his wife for life; with ulterior trusts for the benefit of the daughters. The testator directed the rents and profits of the real estate, until the sale, to be applied in discharge of the interest due on the mortgages, and the surplus, upon the trusts of his residuary personal estate. A decree pronounced by Lord *Thurlow* (u), declared the money, arising by sale of the real estates devised in trust to be sold, to be equitable assets, and liable to answer the deficiency of the personal estate to pay the debts. When the causes came on for further directions upon the Master's report, it appeared that there was a deficiency for the payment of debts, without applying the estates devised to the wife and daughters; and that the testator was, at his death, besides the estates sold, seised of other freehold and copyhold estates. Upon a supplemental bill, filed by a creditor, it appeared that the copyhold estate was not surrendered to the use of the testator's will; and that *Christian Kidney*, the defendant and surviving daughter, and customary heir, had received the money produced by the sale thereof, and the rents and profits until sale. It further appeared that there was a settlement in 1768, whereby certain real and personal estates were settled, previously to the marriage of the testator, upon

(t) 12 Ves. 136.

affirmed by Lord *Rosslyn*, and also

(u) 1 Ves. jun. 436; 2 Ib. 267; upon appeal to the House of Lords.

Application of
election.

To creditors.

himself, his wife, and the issue of the marriage; the settlement contained a covenant to settle after acquired property, as to one-third, upon the trusts of the settlement; and as to the other two-thirds, upon trust for such persons, &c., as *William Kidney* should by deed or will appoint; in default thereof to him absolutely. It also appeared that his wife became entitled to a share of the residuary personal estate of her father, *B. Pomeroy*, by his will dated 1778. The supplemental bill, filed by the creditor, prayed an account of the money received by the daughter, *Christian Kidney*, on account of the sale and the rents of the said copyhold estates, to be applied in aid of the fund for payment of the debts; also of the share of the residue of *Pomeroy's* personal estate, and of the freehold and leasehold devised by *W. Kidney* to his wife for life; and to be applied in aid in the same manner. For the widow and daughter it was insisted, that the intention being clear that the testator's wife and family should have that part of the estate devised, and the creditors, being, as far as they could obtain satisfaction out of the testator's real estate, mere legatees, could not dispute any devise by his will; and that, as to equitable assets, the creditors were in the same situation as legatees. Sir *William Grant* decided, that as to the two-thirds of the residuary personal estate of *Pomeroy*, there was no question; and as to the estates devised to the widow, that they were also liable to the claims of the creditors; observing, "another objection made for the widow is, that the creditors take a benefit under the will of the testator by the devise for payment of the debts generally; and therefore they shall not be permitted to disappoint that part of the will, by which a provision is made for the widow; that is, that the doctrine of election is to be applied to creditors. It is utterly inapplicable. It never has been so applied; and half the decrees upon marshalling assets are wrong, if there is any ground for that claim. It is true, creditors by simple contract cannot have any right, except by marshalling, against the real estate; unless the testator thinks fit to devise it for satisfaction of the debts generally; yet they have never been held to stand in the same light as legatees. When the testator lets in such creditors by a charge, it is now settled, whatever doubt may formerly have been entertained upon it, that creditors, under a charge of debts and legacies, are to be paid in preference to legatees; and, though the Statute of Fraudulent Devises would undoubtedly prevent a devise for payment of legacies, so as to disappoint creditors by specialty, it would not prevent a devise for payment of debts generally; though the effect would be to let

in creditors by simple contract, to the prejudice of creditors by specialty" (v). With respect to the copyholds, his Honor decided, that though they were not surrendered to the use of the will, the want of the surrender would be supplied for the benefit of the creditors; the words in the will being sufficient to comprehend all the real estate (w).

Application of election.

Eighthly. The application of the doctrine of election to persons taking in succession. 8. To persons taking in succession.

Where the benefit given by the will, in lieu of a prior established right, is limited to several persons so entitled in succession, the election of the first taker will not, it should seem, conclude those in remainder, but the latter will be allowed to elect as their respective interests accrue.

Thus in *Ward v. Bough* (x), *Lancelot Couper*, after giving certain benefits to his wife, bequeathed to trustees 1,400*l.* upon trust to place out at interest, and pay the same to his daughter *Margaret*, whose receipt alone was to be a discharge; and, on her death, to divide the principal equally between her children and their issue, at twenty-one; but if none, then to his son *John*, whom he appointed residuary legatee. The testator made similar, but unequal provisions for his children *Ann* and the said *John*; and then, reciting his marriage articles, he declared, that the provisions made by his will for his wife and children, were in lieu, recompense, and satisfaction of all right, claim, and interest, which they were, or might be entitled to, upon or in his estate and effects, in respect of his marriage articles; and that if his wife and children, or any of them, refused to accept such testamentary provision upon those terms, and to give proper discharges to his executors, and the trustees in the articles, upon request, the legacy and bequest to them or such of them as refused, were to be considered void. *Margaret* attained twenty-one, and married; and the question being, whether her election to take under the will or articles, would bind her issue? It was determined by Lord *Alvanley*, M. R., that her election would not have that effect.

(v) See *Ridout v. Lord Plymouth*, 2 Atk. 104; *Lingard v. Lord Derby*, 1 Bro. C. C. 311; *Hughes v. Doulsen*, 2 Ib. 614.

(w) See also sect. III., sub-sect. 2,

div. 2, sub-div. 2, ante, p. 1615.

(x) 4 Ves. 623; and see *Long v. Long*, 5 Ib. 445; and *Forrester v. Cotton*, Ambl. 388; 1 Eden, 532.

Application of election.

9. As between particular and residuary legatees.

Ninthly. The application of the doctrine of election, as between a legatee specific or general, and the residuary legatee.

Thus, for instance, where a testator affects to devise an entailed estate, and by his will gives a legacy or other testamentary benefit to a person claiming a paramount interest in the estate, inconsistent with such devise, there the person, taking the testamentary benefit, will not, as between himself and the residuary legatee, be bound to elect between his paramount interest and the testamentary benefit; because the residuary legatee, *ex vi termini*, is only entitled to what remains after debts are discharged.

In *Cavan v. Pulteney* (*y*), the bill by Lord *Darlington* against *William*, afterwards Sir *William Pulteney*, was filed by him in two capacities; first, as a disappointed devisee in remainder under General *Pulteney*'s will, in consequence of the election of *Frances*, the wife of Sir *William Pulteney*, to take her estate tail under the will of Sir *William Pulteney* (the testator), and against the will of General *Pulteney*; and secondly, as residuary legatee under the latter will of a fund, which would be liable to make satisfaction to the evicted lessees (*z*). Lord *Darlington*'s bill suggested that General *Pulteney*, having by his will disposed of all the real property he had, as well from Lord *Bath*, as his grandfather, Sir *William Pulteney* and Mr. *Guy*, and having by the same will given several benefits to Sir *William Pulteney* (the defendant), viz. the reversion of the *Bradford* estate, and a moiety of the sum of 38,136*l.* 16*s.* 1*d.* secured by mortgage on that estate, for life, with limitations to his wife and issue male, Sir *William Pulteney* (the defendant), taking benefits under that will, was bound (*electively*) to confirm any act General *Pulteney* had done; or otherwise, in the alternative, that the Court would lay hold of any interest he had derived under the will of General *Pulteney* to make satisfaction. But Lord *Loughborough*, C., said, it is a little difficult to conceive how, as residuary legatee of the personal estate, he should state himself to be a person in whose favour this Court would interpose, against any person claiming specifically under the will; for the residue is only what remains after all the debts paid; and if a particular demand of any person, taking a benefit under the will, subjects the personal estate to a debt, the cases have not reached so far, as that the benefit

(*y*) 2 Ves. jun. 544; 3 Ib. 384,
supra, p. 1638.

(*z*) *Supra*, p. 1639.

of putting a party to election can ever go to a residuary legatee of the personal estate.

Application of election.

Tenthly. The application of the doctrine of election to the widow and children of the testator, taking according to the custom of London.

10. To widow and children under custom of London.

By the custom of *London*, if a freeman die, the surplus of his personal estate, after his debts and funerals paid, shall be distributed, one-third to his wife, another third to his children, and the other third part he may dispose of by his will (*z*), and if any child die after the father, before twenty-one, unmarried, its share goes to the other children (*a*). But by the statute 11 *Geo.* 1, c. 18, s. 17, it is enacted, that any person becoming free of the city after the 1st of June, 1725, may dispose of his personal estate to such person or persons, and to such use and uses as he shall think fit; unless he shall, before marriage, agree by any writing under his hand, in consideration of his marriage or otherwise, that his personal estate shall be subject to the custom, or unless he shall die intestate; and the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, and be distributed and distributable according to the custom of the city.

Hence it follows, that questions with reference to the custom of *London*, in regard to election between customary shares and legacies given to widows and children cannot arise, except when freemen enter into agreements, stipulating that their property shall be liable to the custom; in which case, the same rules and observations are applicable as in ordinary cases before considered.

1. Where the dispositions of the will were inconsistent with the claims under the custom.

1. Where dispositions of the will inconsistent with claims under the custom.

Thus in *Hervey v. Sir Edward Desbouverie* and others (*b*), Sir *Christopher Desbouverie*, being seised of a considerable real estate, and possessed of a personal estate of the value of 60,000*l.*, by his will, in 1730, gave to *Ann*, his eldest daughter, afterwards the wife of *Hervey*, one of the plaintiffs, 12,000*l.*; and to his daughter *Elizabeth*, another of the plaintiffs, 7,000*l.*; and to the defendant, *John Desbouverie*, his younger son, 14,000*l.*; and devised the residue of his personal estate to his executors, in trust for his

(*z*) Com. Dig. tit. Guardian, (G. 2).

(*a*) *Ib.*; 2 Vern. 559.

(*b*) Ca. Tem. Talbot, 130.

Application of election.

To widow and children under custom of London.

eldest son *Freeman Desbouverie*, until he attained twenty-one; and in case he should die before that age, he gave the residue to the defendant *John*. By a codicil in 1732, he gave his daughter *Elizabeth* 3,000*L*. more, which made her fortune 10,000*L*., and, after taking notice that his daughter *Ann* had been some time married to Mr. *Hervey*, instead of 12,000*L*. he gave her but 10,000*L*., and desired that Mr. *Hervey*, should immediately upon his death, give the other executors (Mr. *Hervey* being one of them) a bond, renouncing all further claims and demands upon his estate. The testator died soon after, leaving no wife, and only the four children above named. About two years after, *Freeman Desbouverie* died, at the age of eighteen, having made his will, and appointed his brother *John* residuary legatee. The plaintiff's bill was, to be let into a share of *Freeman's* orphanage part, as distributable among the surviving children by the custom; *Freeman* dying before twenty-one, who could neither devise his orphanage share before that age, nor could his father devise it upon the contingency of his dying before twenty-one, to one child in exclusion of the rest: the custom being paramount to the will, and not to be controlled by it. But Lord *Talbot*, C., observed, that it was clear that neither the freeman, nor the orphans could devise against the custom; nor could they any more devise what accrued by survivorship than the original share; but still the father might make a disposition by his will, and leave it to his children's option, either to take by the will, or stand by the custom; and his Lordship expressed his opinion, that the testator's intent was to dispose of his personal estate in such manner, as that if the plaintiffs chose to take by the will, they should be barred of what was due by the custom. He decreed accordingly, that they must elect; and if they took by the will, then to take nothing by the custom.

Again, in *Cowper v. Scott* (b), *Henry Bedel*, a freeman of *London*, had one son and six daughters, four of whom were married in his life, and advanced by portions. *Henry Bedel*, by his will in 1727, having disposed of his personal estate, and also part of his real estate among his children, devised several freehold lands and tenements to trustees, in trust, within six years after his death, to raise and pay out of the rents and profits of the premises, 1,500*L*. a piece to his two youngest daughters, with interest at four per cent. *per annum*, until the same should

(b) 3 P. Wms. 119, 123; *Morris v. Burroughs*, 1 Atk. 399; and *Kitson v. Kitson*, Pre. Cha. 351, S. C.

be paid, for their maintenance and education. One of the questions was, whether *Ann*, the youngest daughter, who married *M. Searle*, was entitled to the 1,500*l.* given her by the will, and also to her orphanage part: and Sir *Joseph Jekyll*, M. R., decided that she must make her election, observing; “ It appears upon this will, that the testator intended to make equal provisions for all his children, especially in case his son should die without issue male, which has happened, in his life. He gave an estate in land to each daughter; he moreover gave to his son, and also to his six daughters a seventh part to each of his personal estate, intending thereby an equal division of all his estate among his children. Wherefore, if any of his children shall go about to disappoint such intention, and prevent that equality which the will designed, such child shall be excluded from taking any benefit by the will, as well with respect to the real as the personal estate; and not be allowed to elect what he likes best by the will, and entitle himself to the rest by the custom, but must abide by the will only, or by the custom only; and the difference is, where the will makes a disposition of the whole estate both real and personal of the testator among his children; and when it gives land and some share of the testamentary part to a child, who, in such case, may lay claim thereto, without crossing the rest of the will. But wherever the child’s claim by the custom tends to frustrate and defeat the intention of the father, in all such cases he shall not be suffered to take any part by the will, either of the real or personal estate, if at the same time he would avail himself of the custom.”

Application of election.

To widow and children under custom of London.

2. Where the dispositions of the will are not inconsistent with the distribution under the custom.

2. Where not inconsistent.

When the widow and children can take under the custom and the will, without defeating any of the provisions of the latter, the legatees will be entitled to both; but it does not seem settled, whether an *express declaration* that the legacies shall be paid out of the testamentary share, is not necessary to prevent the legatees from being put to their election.

In *Babington v. Greenwood* (c), Lord *Parker* expressed his opinion that, if the legacies did not exceed the amount of the testamentary part, the wife and children might claim both under the will and the custom. But in *Car v. Car* (d), Lord *Hardwicke* seems to have considered the rule to have been otherwise,

(c) 1 P. Wms. 530.

(d) 2 Atk. 278.

Application of election.

To widow and children under custom of London.

for in that case, his Lordship said, "Where a freeman of *London* gives a legacy *generally* to a child, the legatee cannot take the legacy and claim his customary part too, unless the testator *expressly* mentions that the legacy shall come out of the testamentary share; and this is the established rule of the Court."

So in *Frederick v. Frederick* (e), *Thomas Frederick*, having two sons and three daughters, by his will, in 1718, gave to his eldest son *John*, 1,000*l.*; to his second son *Thomas*, 1,000*l.*; to his three daughters, 1,000*l.* each; and 10*l.* to his wife; and devised such part of his real estate as was unsettled, to *Thomas*, in tail, but gave the bulk of his estate to his three grandsons, the children of his said son *Thomas*. The testator had in his lifetime contracted for valuable consideration, to take up his freedom of the city of *London* within a year, and having survived that period, died without having obtained his freedom. Lord Chancellor *Macclesfield* being of opinion, that *Thomas Frederick*, having on good consideration made the agreement to become a freeman of *London* within a year, and having survived that period, should in equity be taken for a freeman, and his personal estate distributed accordingly; viz. one-third to the wife; another third to the children; and the will to operate only upon the dead man's third; that the wife should have the benefit of her chamber and paraphernalia, but that the legacies given by the will to the children were void, they not being given out of the dead man's part, but out of the whole personal estate, and so void, unless the children should release their right to the rest of the estate, and abide by the will. This decree was affirmed in the House of Lords (f), with 200*l.* costs.

3. Where some children elect to take their orphanage part and others under the will.

3. The effect of election, where some of several children elect to take their orphanage part, and others to accept the provisions under the will.

In this case the customary shares of those, who elect to abide by the will, will not belong to those who elect to take under the custom, as part of the orphanage share; but will be considered as part of the testator's estate, and go according to the will.

In *Rawlinson v. Rawlinson* (g), before Lord *Harcourt*, the 8th of *July*, 1716, a freeman had nine children, of whom one chose to abide by the custom, the others by the will; and his Lordship

(e) 1 P. Wms. 712, 722.
(f) 4 Bro. Parl. Ca. 7.

(g) Cited by Lord *Hardwicke*, in *Morris v. Burrows*, 2 Atk. 628.

decreed that child one-ninth, and the other eight-ninths of the personal estate to be subject to the disposition of the will.

Application of election.

Upon this case Lord *Hardwicke*, in the case next stated, observes, that it had generally been cited to shew that the custom was, that, when a wife was compounded with, the orphanage was one moiety, but, according to the case, as then stated, it was in point, and his Lordship thought it agreeable to the reason and equity of the thing.

To widow and children under custom of London.

In *Morris v. Burrows* (h), *John Burrows*, at his death, left five children, the plaintiff *Elizabeth*, *Gyles*, *John*, *Mary*, and *Ann*, the last four having been advanced by the father in his lifetime. By his will he gave legacies to all his children, and to other persons; and the residue of his real and personal estates to his sons *John* and *Gyles*, and his daughters *Mary*, *Elizabeth* and *Ann*, absolutely, and in equal proportions. The testator died in 1732. Some of the children elected to take by the custom: and the question was, whether the shares of those who elected to take by the will, should go among the others, who elected to take by the custom, or according to the will. Lord *Hardwicke* decreed, that the share of those who elected to take by the will accrued to the testator's estate to go according to the will. In the course of his judgment, his Lordship observed, that it was a question, not of the custom, but depending on the equity of the Court, which was, that no person should take by the will, and at the same time do any thing that should destroy the will. Where a father had only disposed of the testamentary part, they might take both, but where he had taken upon him to dispose of both, they could not, because it was inconsistent, and must one way or other break in with his dispositions. Therefore, he must put them to make their election. If they elected to take by the will, it was only a submission that their part should go according to the disposition of the father. That making the share of the child, who elected to take by the will, to accrue to the orphanage part, was to give it contrary to that election; that it was not directly, but in consequence, letting those who took by the custom take benefit by reason of the will. That there was no wrong done to the children who took by the custom; for they had all that they would have had, if all had taken by the custom, and that as the whole depended upon the election of the children, and as all might have taken by the will, so might any one.

(h) 2 Atk. 628.

Sect. IV. Of Election under a *mistake*, or a misconception of the extent of the claims in the party electing.

Election under mistake or misconception.

Where legatees make their election, or receive, for a length of time, the provisions of the will, without knowing their rights and the circumstances of the testator, they will not be concluded by such election or receipt; this rule corresponds with that of the Court of Chancery in cases of dower.

In *Pusey v. Desbouvrie* (i), before stated (k), Lord Talbot expressed his opinion that the daughter ought not to suffer by her ignorance of the law, or the custom of *London*; and, that although by the brother's information she might know she had power to elect, yet that she might not know she had a right to an account, and to know the amount of her orphanage part before she elected; for, had she known that, it is probable she would not have elected to take her legacy.

In *Wake v. Wake* (l), before stated, the question was, whether, by receipt of the legacy and of the annuity for three years, the widow had not made her election to abide by the will? But Buller, J., for the Lord Chancellor, observed, the question was, whether she had full knowledge of the circumstances of the testator and of her own rights; and if so, she should not afterwards deny it; but that after three years only he could not say she was not entitled: and he decreed accordingly.

In *Kidney v. Coussmaker* (m), stated in part in a former page, the widow, by deed poll dated the 29th of *November*, 1787, released to the executors and trustees all her dower and thirds; and it was thereby declared that the release should not bar or affect the provision or benefit by the settlement or will or to which she might be entitled out of the personal estate of her father by his will or otherwise. The reader is reminded that one of the claims of the creditors of the testator was to the property devised to the wife by his will. Against this claim, it was objected on the part of the widow, that had it been set up at the time she elected, she would not have elected, as she did, to take the estate devised in satisfaction of her dower; that she had a

(i) 3 P. Wms. 315.

supra, p. 1608.

(k) *Supra*, p. 1592.

(m) 12 Ves. 136, before stated,

(l) 1 Ves. jun. 335; *supra*, p. 1594;

supra, p. 1643.

also *Rumbold v. Rumbold*, 3 Ves 65;

right to an inquiry whether she was entitled to dower or freebench, and what the value of her dower or freebench was; and that, upon the supposition that no such claim was to be made, she elected to take under the will, and to relinquish her dower, according to the condition imposed upon her by the testator. Upon this part of the case, Sir *William Grant* observed, that the consequence was only that the widow would not be bound by any election she then made; that she must be let in to any of her legal rights, and an inquiry made, in what estates she was entitled to dower or freebench: her election, made under a mistaken impression that the creditors were not to make any claim upon those estates, not binding her.

Election under
mistake or mis-
conception.

SECT. V. Of election as implied from acts of *acceptance* or *acquiescence*.

Cases involving the question how far the acts or acquiescence of a party, bound to elect between a paramount right and a testamentary disposition, constitute a binding election upon himself and his representatives, depend upon their own peculiar circumstances, rather than the application of any general rules. A detailed statement of the larger proportion of those cases bearing upon this subject would unnecessarily extend the proposed limits of the present work: but a reference to some of the principal cases will properly be here introduced (n).

Of acceptance
or acquies-
cence.

We shall briefly consider, *first*, how far the acts and acquiescence of the party have been considered as binding on himself, and, *secondly*, on his representatives.

1. *First*, as to the party himself. It is to be inferred from the cases of *Pusey v. Desbouvrie*, *Wake v. Wake*, and *Kidney v. Coussmaker*, stated in the last division (o), that the acts of a party, otherwise indicative of his election, will not be binding, unless done with a knowledge of his rights; nor will his acquiescence, in conformity with those acts, for the same reason, of itself, be conclusive against him (p). The same cases, and those

1. As to the
party himself.

(n) The reader will find some of the cases collected in a valuable note of Mr. Swanston in his reports, Vol. 1, p. 382.

Lef. 267; *Rumbold v. Rumbold*, 3 Ves. 65; *Welby v. Welby*, 2 Ves. & Bea. 200.

(o) See also *Earl of Northumberland v. Marquis of Grandby*, 1 Eden, 489; *Moore v. Butler*, 2 Scho. &

(p) See also *Whistler v. Webster*, 2 Ves. jun. 371; *Stratford v. Powell*, 1 Ball & Bea. 1; *Chalmers v. Storil*, 2 Ves. & Bea. 225.

Of acceptance
or acquies-
cence

referred to in the note, likewise justify the inference, that the acts so done must be done with an intention to elect.

In *Stratford v. Powell*, Lord *Aldborough*, by deed in 1799, conveyed to his wife Lady *Aldborough* his house, furniture, paintings, &c.; and by will, in 1800, bequeathed the same with other property to her for life, with remainder to her issue. He died in *January*, 1801, and she married the defendant in the *December* following. After the death of Lord *Aldborough*, Lady *Aldborough* entered into possession of the devised property, defended an ejectment as devisee, and received the rents up to her death, which happened in *July*, 1802. The Master of the Rolls in *Ireland* decided, that although possession alone did not amount to election without full knowledge of her rights, yet that the possession of Lady *Aldborough*, coupled with the circumstance of the defence of the ejectment, with full knowledge of her rights, and with a declaration of her intention to abide by her husband's will, and which appeared by the evidence, amounted to an election binding upon her and her representatives.

So in *Briscoe v. Briscoe* (*p*), where the daughter of the testator having a right to elect between a legacy given to her by her father's will, and a sum to which she was entitled under settlement, and in opposition to the will, proceeded on her marriage to settle the whole of the legacy; and it was held a dealing with the property which constituted an election, and that the daughter had elected accordingly.

In *Dillon v. Parker*, one of the difficulties in the case arose from the circumstance, that the acts of Sir *Henry Parker*, who was bound to elect between his paramount right and the dispositions of his son *John Parker*, were so equivocal, as not to be sufficiently indicative of his intention to elect (*q*): while, on the other hand, the acts of the daughters were considered clearly expressive of their intention to elect to take under the will of their father Sir *Henry*, and not under that of their brother. Besides the inquiry whether the party has done any act constituting election, and, if done, with a knowledge of right, and an intention to elect, a further question arises, whether mere length of time, after acts done, will render the apparent or supposed election binding upon the party himself, and preclude him from availing himself of the plea of ignorance of his rights; and, if so, what length of time will be sufficient. Upon this point, it is

(*p*) 1 J. & Lat. 334.

(*q*) 1 Swanst. 380, 387; 1 Jacob, 505; D. P. 1 Cl. & Fin. 303.

conceived, no general rule can be laid down, and it would seem to be an inquiry attended with difficulty, depending upon the peculiar circumstances of each case (*r*). In *Buttricke v. Broadhurst*, as stated in *Brown* (*s*), Lord *Thurlow* is reported to have said, in allusion to the case of *Beaulieu v. Lord Cardigan* (*t*), "All that can be gathered from that case was, that election may be kept open for fifty years. That no line could be drawn from mere length of time, but it must be from circumstances shewing the intent of the party."

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In Mr. *Vesey*, junior's, report of the same case (*u*), his Lordship is reported to have said, that he thought Lord *Northington* tolerably well founded in that case; but it was determined otherwise in the House of Lords; who decided that the right of election lasted fifty years. But all that was determined by it was, that, under circumstances, it might last till the whole affair was wound up, and the trusts executed.

In *Wake v. Wake* (*x*) it was held, that three years' receipt of a legacy and annuity under the will, in ignorance of her rights, did not preclude the widow from election.

In *Dillon v. Parker* (*y*), Sir *Thomas Plumer*, M. R., observes, that the argument which represents lapse of time, and acts performed as conclusive, without regard to intent, is subject to great difficulties.

It may probably be concluded, therefore, that where the acts of the party, bound to elect, are equivocal, so as not to prove a knowledge of his rights, and an intention to elect, it does not appear that any time is prescribed as a bar to the party himself during his life, from availing himself of his plea of ignorance of his rights, and consequently of making his election; unless, indeed, an impediment arise from the circumstance, that the parties to be affected by his claim, cannot be restored to the same situation they would have been in, had the claim been made at an earlier period (*z*).

In *Tucker v. Sanger* (*a*), the testator devised an estate called *Hokwell* to *Edmund Sanger* (who was the heir-at-law of the testator and his wife) and his heirs, on condition of his confirming the will as to other estates called *Reeds* and *Hammetts*, of which

(*r*) *Dillon v. Parker*, 1 Swanst. 381.

(*s*) Vol. III., p. 90.

(*t*) Ambl. 533; 6 Bro. P. C. 232.

(*u*) Vol I. p. 172.

(*x*) *Ubi supra*, p. 1594; and see *Reynard v. Spence*, 4 Beav. 103.

(*y*) 1 Swanst. 386

(*z*) See *Tibbitts v. Tibbitts*, 19 Ves. 662, 663; also *Edwards v. Morgan*, M'Clell. Rep. 541; confirmed Dom. Proc. 1 Dow. & Cl. 104.

(*a*) M'Clell. (E.), 224, 439.

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the testator, was only seised in right of his wife, but which he devised in trust for his daughter *Mary Tucker*, and her issue. Upon the testator's death in 1806, *Edward Sanger* entered into possession of *Hobwell*. Upon the death of the testator's widow, *Reeds* and *Hammetts* descended upon *Edward Sanger*, but *Mary Tucker* entered into possession, and received the rents and profits of those estates. *Edward Sanger* never confirmed the will, nor declared his election; but refusing to confirm the will after an acquiescence of about fifteen years, a bill was filed, among other things, to compel him to make his election; if he had not made it already: and *Alexander*, C. B., ordered it to be referred to the Master to compel him accordingly. The Chief Baron seems to have considered the above case as not falling strictly within the ordinary principles of election in equity, but that the question for his consideration was, whether the express condition of the will had been broken, and if so what were the consequences (a).

But when the fund is free *ab origine*, and the value and amount of it easily ascertained, *Buttrick v. Broadhurst* (b) has decided, that the legatee having received for five years the provision under the will, will be considered bound by such election.

In that case, the plaintiff's husband, by his will, of which he appointed his wife, the plaintiff, sole executrix, devised all his real and personal estate to trustees, upon trust to permit his wife to receive the rents and profits for her life, provided she did not marry again. The trustees never acted. The wife received the rents and profits of the real and personal estate for five years after her husband the testator's death, and then instituted a suit, claiming to elect to take an interest in a trust fund of 2,000*l.* under her marriage settlement, instead of the property under the will. Lord *Thurlow* decided, that she had precluded herself from any right to election: observing, "I agree now, that if the wife had filed a bill, stating, that she did not know the state of the fund, and desiring to have the debts and legacies paid, and the property cleared, that she might elect to advantage, she might have done so. So, if the other parties had filed a bill, it could only have been to force her to make her election. But here, having taken possession under the will, and the estate being a free fund from the beginning, I cannot think of a principle, upon which the Court can say she is now competent to

(a) M'Clell. (E), 447.

(b) 1 Ves. jun. 171; 3 Bro. C. C. 88, S. C.

elect. The bill must be dismissed; but I wish it to be understood, that it turns upon the particular circumstance, that the bill was filed without any ground: and no suggestion, that the real or personal estate is in such a situation as to render it doubtful what the result would be. She consequently has laid no ground that entitles her to elect after enjoyment for five years."

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2. As to the *representatives* of the party bound to elect.

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Where the party himself would have been bound by the acts done, of course his representatives will be equally bound thereby. In the case of the *Earl of Northumberland v. Earl of Aylesford* (b), Duke *Algernon*, under the will of his father, *Charles Duke of Somerset*, became entitled, among other things, to the sum of 35,000*l.* due on mortgage, with an express condition of his releasing other claims. He never executed the release, but his acts being considered as evidencing his election to take under the will, his executors were decreed to release.

In *Ardesoife v. Bennet* (c), the testator devised copyhold to his wife in fee, which did not pass, for want of the admittance of the testator and a surrender to the use of his will. He also bequeathed to trustees the sum of 5,000*l.* in trust to pay the interest to his sister, *Elizabeth*, the wife of the plaintiff, for her separate use for life, and after her death the principal to her appointment: and, in default thereof, to her executors and administrators. *Elizabeth* was the testator's heir-at-law; the devisee was admitted after the testator's death: *Elizabeth* received the interest of her legacy up to the time of her death, a period of about five years after the admittance of the devisee, without making any claim to the estate, and died without exercising her power of appointing the principal of the legacy; whereupon her husband claimed the legacy. She left an infant son and heir-at-law of herself and the testator. The Master of the Rolls decreed that *Elizabeth Ardesoife* had made her election to take the legacy, which appeared of greater value than the copyhold estate, and that the infant was thereby bound, and should, when of the age of twenty-one, surrender the copyhold to the devisee who should enjoy in the meantime.

But where the acts of the party himself would not have been binding upon him, had he, during his life, insisted upon his rights of renouncing those acts, yet it does not thence follow that

(b) Amb. 540. 657; see also 2 Powell, 1 Ball & Bea. 1. Ves. sen. 525; and *Stratford v.* (c) 2 Dick. 463.

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his representatives, after his decease, are equally entitled to insist upon the right, which the party himself could have enforced.

On the contrary, it is said by Lord *Hardwicke* in *Archer v. Pope* (*d*), that the Court will not suffer the representative of the wife of a freeman of *London* to insist upon the custom, in contradiction to what was done by the wife; and that in cases where, if the wife had been before the Court, she might have had an election.

Again, in *Tomkyns v. Ladbroke* (*e*), the same Judge also observes, "Where a freeman by will disposes of his whole personal estate between his wife and children, and, after his death, the wife has submitted to the will, (not by declaration in writing, but without disturbing it), and the wife dies, and her representatives bring a bill for an account, insisting that the wife was entitled to her share by the custom, and that her husband's will was void, the Court has denied that relief to the representatives of the wife in several cases; because her enjoying it under that was an evidence of her assent, and upon that principle only, not to disturb things long acquiesced in, in families, upon the foot of rights, which those, in whose place they stand, never called in question."

In determining the right of the representatives of a party bound to elect, and who has accepted benefits under the instrument imposing the duty of election, but without expressly electing, a question arises, whether they can make compensation to the parties affected by their election, and place them in the same situation, as if those benefits had not been received; for if they can, it would seem, in cases where the long acquiescence of the party under whom they claim would not be considered binding, as in the case put by Lord *Hardwicke*, that the representatives will be at liberty to renounce the benefits received, and elect for themselves (*f*). Sir *Thomas Plumer*, in the case of *Dillon v. Parker* (*g*), said, that it was the disposition of the Court so to determine.

In the case of *Dillon v. Parker*, under a marriage settlement in 1741, the manor of *Talton*, in *Worcestershire*, a house in *Salisbury-square*, *Fleet-street*, and a farm in *Tredington*, in the county of *Worcester*, were settled upon Sir *Henry John Parker* for life; remainder to his first and other sons successively in tail male;

(*d*) 2 Ves. sen. 525.

(*e*) Ib. 592; see also 667, Ib.

(*f*) See 2 Bro. C. C. 5; 2 Scho-
& Lef. 268.

(*g*) Next stated, 1 Swanst. 385.

remainder to himself in fee. The issue of the marriage were *John Parker*, and two daughters, *Catherine* (afterwards married to *Garstin*) and *Margaret Sophia* (afterwards married to *Strode*). *John Parker*, the son, being seised of other estates, by will, dated 1769, devised them to his father, Sir *Henry*, for life; and after his decease to trustees in fee, upon trust for the benefit of his said two sisters, *Catherine* and *Margaret Sophia*, and their issue. He also devised the manor of *Talton*, the house in *Salisbury-square*, and the farm at *Tredington*, with other property by name, and also all other estates whatsoever which should descend or come to him from his father to his two sisters, *Margaret* and *Ann Parker*, (daughters of Sir *Henry* by his first wife), in fee as tenants in common. He gave all the residue of his personal estate to his father, whom he appointed sole executor if he survived him. By his codicil, he devised an after purchased estate, in *Tredington*, to his father in fee, and released his portion of a bond debt due to him and his two sisters, *Catherine* and *Margaret Sophia*, from his father, enjoining his sisters to forbear any proceeding thereon, under pain of forfeiting the bequests under his will. *John Parker* died in *September*, 1769, unmarried and without issue. Sir *Henry* entered into possession of the estates devised by his son, mortgaged part, and possessed himself of his personal estate. By his will, dated in *November*, 1769, being seised of the reversion in fee under the settlement, he devised the settled estates, subject to a term of one thousand years, for payment of his debts and legacies, to his two daughters, *Margaret* and *Ann*, in moieties, for life; with remainders to their first and other sons successively in tail male, with ulterior remainders including a limitation to Sir *William Parker* for life, and to his first and other sons in tail male, &c. He then devised the estates, to which he was entitled under the will of his son, to trustees, to the uses and upon the trusts before limited and declared of his freehold estates. By a codicil, he limited the estates devised to his daughters, *Margaret* and *Ann*, in the event of their death without issue male, to his daughters, *Margaret Sophia Strode* and *Catherine Garstin*, and to their first and other sons in tail male, &c. *Margaret* and *Ann*, upon the testator's death in 1771, entered into possession of the estates devised to them by their father and brother. *Margaret* devised her moiety of the estates devised by her brother to her sister *Ann* in fee; who, after her death in 1785, entered into possession of the estates devised to her by her father, brother, and sister; and, by will, in 1811, devised the house in *Salisbury-square* to *John Joseph*

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Dillon in fee; and the manor and manor-house of *Talton*, and the farm at *Tredington*, to *Harry Parker*, the father of *Sir William Parker*, in fee, and appointed *Sir William* executor, with a legacy of 500*L*. and *John Joseph Dillon* residuary legatee. The devise to *Harry Parker* lapsed by his death in testatrix's lifetime. *Ann* died, leaving *John Joseph Dillon* her heir-at-law, who filed his bill against *Sir William Parker*, insisting that *Sir Henry Parker*, by accepting the benefits under the will and codicil of *John Parker*, had elected and bound himself to conform thereto, and that he, the plaintiff, was entitled to the settled estates. He also filed a supplemental bill, praying that the defendant might elect to take under or against the will of *Ann*, and that the plaintiff might be quieted in the possession of the estates at *Talton* and *Tredington*. One of the questions was, whether *Sir Henry* had elected to take under the will of his son? and another, whether *Margaret* and *Ann* had elected to abandon their rights under the brother's will, and abide by their father's. For the defendant it was stated, that the title, under which the plaintiff claimed, if it then existed, existed forty-three years ago; and it was urged, that the acts of *Sir Henry* were equivocal, some denoting an intention to take under the will, others against it. It was insisted that the daughters recognised their father's will, by acts amounting, if not to election, to acquiescence and confirmation. With respect to the election of *Sir Henry*, *Sir Thomas Plumer* said, he felt great difficulty in saying *Sir Henry* ever meant, or even thought, he was bound to elect: whether his acts would have concluded him, had his daughters insisted during his life that he had made his election, was a very different inquiry; but it might be doubtful, whether, on his death, the daughters had any further right, than that of requiring his representatives to make their election. On that point, after stating the disposition of the Court before noticed, he proceeded thus: "If, therefore, immediately on his death it had been contended that *Sir Henry* had elected, and was bound to relinquish the settled estates, it would have been a question, whether his representatives might not have claimed a right to make their own election, rendering satisfaction for the benefits which he had enjoyed. This first part of the case is full of difficulty. The plaintiff, who desires the Court to deprive the defendant of his legal estate, is bound to establish an indisputable title; he must shew that the son possessed power to devise the estate, or that *Sir Henry* elected to abide by his will; the bill is not framed for the purpose of putting *Sir Henry's* representatives to election, and the fact of

election by him is negatived by his will made immediately after the death of his son. The argument which represents lapse of time and acts performed as conclusive, without regard to intent, is subject to great difficulties.”

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Those difficulties, his Honor observed, the second point in the case rendered it quite unnecessary to encounter; and he decided that the daughters, adult and competent, by a series of explicit deeds, had assumed the estates devised by their father, in the character of tenants for life, constituted by that devise, a title totally inconsistent with their claims as tenants in fee of the same estates under the will of the son. In regard to the will of *Ann Parker*, which devised the *Talton* estate to the person who would have been entitled to it under the will of *Sir Henry*, his Honor observed, that it might be said to show a disposition to abide by the will of the son; but when, in so many transactions with third persons, the daughters had recognized their title as devisees for life, they could not, after so long an interval, assume another character. Neither could the plaintiff, insisting that it was not competent to *Sir Henry*, to claim against his son's will, at the expiration of a month from his death, maintain, that in 1811, after the lapse of forty years, *Ann Parker* might, in defiance of her repeated acts, assert her claim under the will of the son. The plaintiff's bills, except so much of the supplemental bill as prayed the defendant might elect under or against the will of *Ann Parker*, were dismissed. The defendant elected to take, against the will of *Ann Parker*, the premises in *Salisbury-square*, therein devised to the plaintiff; and it was decreed accordingly, that he was bound to relinquish the legacy of 500*l.* given by the said will, and to account for her personal estate (*h*).

SECT. VI. Of the effect or consequences of election.

It remains to close the present chapter with a few observations upon the effect of election, where the devisee elects to retain his own property in opposition to the will, by which the testator affects to devise it to a third person, and gives other property to him. The cases are not sufficiently explicit to authorize any general rule, nor indeed is it possible to reconcile

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(*h*) The judgment in the above case has since been confirmed by Lord *Eldon* upon appeal; see 1 Jacob, C. C. 505; and affirmed D. P. 1 Cl. & Fin. 303.

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all the numerous *dicta* to be found in the books upon the subject under consideration.

In *Tibbits v. Tibbits* (i), Lord *Eldon* observed, the question was, whether the defendant, in the event of his electing to take against the will, was bound to *forfeit* all the benefits he took under it, or whether he was only to make a *compensation* to the plaintiffs for what the testator intended them. On this point he had looked through all the cases with great attention, and they contained many *dicta*, not easily reconciled. Though it would perhaps be too much to say, that that should be the rule universally, his Lordship thought the case before him was a case for compensation only. He was of opinion, that there might be cases, where not only compensation was to be made, but the whole was to be given up. He thought the old principle of the Court, till shaken by some later determinations, was compensation, but it had since been shaken.

The above question leads to another: if the recusant devisee do not forfeit *all*, of course (after compensation made to the disappointed devisee), he retains the *surplus*; but if forfeiture of all interest under the will be the consequence of electing to take against it, what then becomes of the *surplus*? Does the whole property so forfeited, or only a part, equal in value to the property retained by the recusant devisee, go to the disappointed devisee? For if only a competent part goes to the disappointed devisee in the way of compensation, then the surplus must devolve, as undisposed of, to the testator's heir-at-law?

Upon this subject, a difference of opinion prevails: some appear to consider that forfeiture of the *entire* interest under the will, ensues upon the election against its dispositions, and that the property so forfeited belongs entirely to the disappointed devisee (k).

Others are of opinion, that the disappointed devisee is only entitled to compensation, and to that extent only forfeiture takes place; so that, after compensation is made, the surplus should go to the recusant devisee; for whom the testator originally intended it. Mr. *Swanston* supports this view, and thus states his conclusion from the authorities cited in his valuable annotation (l) upon the subject; *First*, that in the event of election to take against the instrument, Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory

(i) 1 Jacob, 319.

Chap. X. sect. v. 1.

(k) 2 Sugd. Pow. 144, 7th ed.

(l) Reports, vol. 1, p. 441.

donee, in order to secure compensation to those whom his election disappoints; *secondly*, that the surplus, after compensation, does not devolve, as undisposed of, but is restored to the donee, the purpose being satisfied, for which alone the Court controlled his legalright.

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Others, again, are of opinion that the surplus, after compensation, does not go to the recusant donee, but, as undisposed of, in consequence of the forfeiture of *all* interest by him, devolves upon the testator's heir-at-law.

The cases considered as authorizing the conclusion that the disappointed devisee is only entitled to compensation, beyond which no forfeiture ensues, and that the recusant donee takes the surplus, are cited and discussed in the learned annotation before mentioned, and to which note and the cases (*m*), and particularly *Streatfield v. Streatfield*, the reader is referred, as rendering any detail in this place unnecessary: indeed most of the cases are cited for other points in the course of the present chapter.

The argument in favour of the conclusion last noticed is, that it is more consonant with the equitable principles of the Court, upon which the doctrine of election is founded, than that of forfeiture; the interference of the Court being only justified for the purpose of making compensation, to the extent in value of the loss sustained by the disappointed devisee: the condition imposed by the will upon the recusant devisee, being satisfied in the contemplation of the Court, when the gift to the disappointed devisee, though defeated in form, is accomplished in substance. It is also urged that the testator's intention to benefit the recusant devisee is not to be overlooked, and that the disappointment of the devisee in the form of the gift intended him, does not afford a satisfactory reason, that, on that account, the disappointed devisee is to take *more* in value than the gift intended him, and so retain the *surplus* beyond the value of the compensation.

The reader will find the authorities conceived to authorize the doctrine that the election of the recusant devisee involves a

(*m*) *Webster v. Mitford*, 2 Eq. Ca. Ab. 362; 1 Swanst. 435, 449; *Streatfield v. Streatfield*, Ca. Tem. Talb. 175; 1 Swanst. 436, 447; *Bor v. Bor*, 3 Bro. P. C. ed. Toml. 167; *Ardesoife v. Bennet*, 2 Dick. 463; 1 Swanst. 437; *Lewis v. King*, 2 Bro. C. C. 600; 1 Swanst. 438; *Pulteney v. Lord Darlington*, 2 Ves. 544. 560;

3 Ib. 385; 7 Bro. P. C. 530. The decree and subsequent arrangement Mr. Swanston observes, are founded not upon the principle of forfeiture, but compensation. *Dashwood v. Peyton*, 18 Ves. 49; *Lord Rancliffe v. Parkyns*, 6 Dowe, 149; *Ker v. Wauchope*, 1 Bligh, 1, 25; *Welby v. Welby*, 2 Ves. & Bea. 190, 191.

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forfeiture of *all* interest under the will, and that the surplus after satisfaction of the disappointed devisee, devolves as undisposed of to the testator's *heir-at-law*, stated or referred to in a valuable note by Mr. *Jacob*, in his edition of the law of *Husband and Wife* (*n*). The arguments there urged in support of total forfeiture and its consequences, suggest that the doctrine of election, being founded on an implied condition, supposed to be annexed to the devise, consistent adherence to principle requires that the consequences, upon breach of that condition, should be analogous (*o*), to those which should ensue, were the condition actually expressed in the will; namely, forfeiture or relinquishment of the estate devised: and it would follow, that the estates forfeited would descend as undisposed of to the heir, subject to the charge of making compensation in value to the disappointed devisee, so that the surplus would be retained by the heir. It is further suggested, that the authorities, in speaking generally of compensation for a loss, have proceeded on a very natural assumption, that the property given by the will, if relinquished, would not be more than sufficient to make compensation: so that the event of a surplus was not therefore contemplated, and, indeed, in general, is an event so improbable, that it is not surprising that it should not be provided for by the decrees.

It is again remarked, that in many of the cases, where compensation to the disappointed devisee is mentioned, the person electing to take against the will, happened to be the *heir-at-law*; and that, therefore, the decree that the recusant donee should make *compensation* was entirely consistent with the rule of his forfeiting *all* interest under the will; since the devised property so forfeited, would devolve upon such recusant devisee as *heir-at-law*, subject to the charge to be made thereout for compensation (*p*): the word "compensation," in such cases, being adopted with reference to what the disappointed devisee was to *receive*, rather than to the extent of the *loss* by the recusant donee. In further support of the doctrine of entire forfeiture by the recusant devisee, and against the rule of compensation, it is urged, that if the recusant devisee be *not* heir-at-law, his taking the surplus of the estate devised to him after compensation made,

(*n*) Vol. I. p. 566.

(*o*) *Webster v. Mitford*, *ubi supra*; *Wigg v. Wigg*, 1 Atk. 383; 2 Freem. 278.

(*p*) Anon. Gilb. Eq. Rep. 15; *Streatfield v. Streatfield*, *Tibbits v.*

Tibbits, *ubi supra*; *Noys v. Mordaunt*, 2 Vern. 581; Gilb. Eq. Rep. 2; *Bor v. Bor*, *ubi supra*; see also an analogous case as to personalty; *Rich v. Cockell*, 9 Ves. 379.

would be at variance with the frequent language of the Courts, that a party cannot take under and against the same instrument; that he must abide by the will *in toto* (*q*); that he can take nothing under the instrument he repudiates (*r*). If, therefore, the recusant devisee (not being the heir) should be permitted at the same time to reject the dispositions of the will, and as devisee, to retain the surplus after compensation made, instead of having the option of either of two estates, he will be choosing the whole of one, and a part of the other.

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Again, it is ingeniously suggested (*s*), in opposition to the recusant donee's taking the surplus, that if the rule of election permitted the party contravening the will to retain the property given by it, subject to a deduction for compensation, there would be little security in any case for the performance of the testator's intention. According to either rule, the election is of course against the will, when the property given by it is less valuable than that which the testator attempts to give away from the party having a paramount title. If it be more valuable, it would according to the rule of forfeiture, be equally of course, that the party having the paramount title would elect to confirm the will. But upon the contrary supposition, the choice would be indifferent to the party entitled paramount to the will in point of pecuniary benefit. If he took under the will, he would be entitled to the larger property; if he took against it, he would retain the smaller property; and the difference would be made up to him by his receiving the surplus value of the other. No benefit could be gained by effectuating the intention, and nothing could be lost by defeating it. Hence, upon this principle, a knowledge of the value of the two funds would not be essential to enable the party having the paramount right to make his election with safety. By electing against the will, he would in every case be secure from loss; and there would be no necessity for postponing his determination till after the accounts were taken, and the value ascertained, or for references to the Master in cases of infants and married women. The force of the last observation, it is conceived, must be admitted in support of the rule of forfeiture; but although it should be thought more in conformity with the cases than the rule of compensation, it would be impossible

(*q*) 3 P. Wms. 124; 2 Atk. 43; Jacob, Husband and Wife, vol. 1, p. 2 Ves. jun. 370. 573.

(*r*) 1 Bligh. 25; 2 Scho. & Lef. 267; see the cases cited by Mr. (s) Law of Husband and Wife, Ib. 575, n.

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by any hypothesis to reconcile all the decisions and *dicta* upon the subject.

The above discussion relates to election between real estates, and does not immediately apply to the professed subject of the present work. With reference, however, to election between legacies of personal estate, although the question respecting the surplus is not very likely to occur, it would not be proper to omit the subject altogether. If a tenant for life of settlement monies, conceiving himself to have an absolute power of disposition, affect to bequeath the principal to a stranger, and gives the person entitled under the settlement a legacy, exceeding the amount of the settlement monies, it is not very probable, that there will be any hesitation in the *cestui que trust* of the settlement monies to accept the legacy; as in all probability the question will be one solely of calculation. But supposing that for other considerations connected with the settlement monies, but not susceptible of pecuniary estimate, the *cestui que trust* should elect to retain his interest under the settlement, and relinquish the legacy, the question before discussed respecting forfeiture and compensation here arises; namely, whether the *cestui que trust* forfeits all the legacy, or only so much as will be equal in amount to the settlement monies, so as to make compensation to the disappointed legatee: and then a further question occurs, if the *cestui que trust* forfeit the *whole*, what becomes of the *surplus*; does it belong to the disappointed legatee, or fall, as undisposed of, into the residue? The arguments before urged are equally applicable. Should the *cestui que trust* rejecting the legacy, likewise be the residuary legatee, if forfeiture of *all* testamentary benefit ensues his election, the reader will observe that he is not in a situation analogous to that of the heir in the case of real estate; for the surplus of the personal estate cannot devolve upon him in the character of *residuary legatee*, for he forfeits all interest under the will.

The preceding discussion perhaps may require further illustration: and, *first*, with respect to election between two devises of real estate. If, for instance, a testator devise an entailed estate to *B.*, and other estates, of which he was seised in fee, to *A.*, the heir in tail, who, notwithstanding the testator's own estates exceed in pecuniary value that of the estate tail, elects to retain the entailed estate against the will: in such case, with reference to the preceding observations, assuming that forfeiture does not ensue, the recusant devisee will take the surplus of the devised estate, subject to the compensation to be made to the disappointed

devisee. But assuming that forfeiture of all the interest under the will *does* ensue, the surplus of the testator's own estate descends to the general heir, who may happen to be *A.*, and who would be bound to convey to *B.*, the disappointed devisee, so much thereof as is equal in value to the entailed estate as a compensation for his loss. Thus *A.* will retain the surplus *as heir*, consistently with the doctrine of forfeiture; and, under the circumstances, compensation only will be made by him to the disappointed devisee. If the heir of the testator were some third person, then *A.* the tenant in tail would entirely forfeit the estate devised to him, which would descend to the heir, subject to the trust in favour of the disappointed devisee, to whom he would be bound to convey a competent part, as a compensation for the entailed estate retained by the recusant devisee (*t*).

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of election.

- In the next place, with regard to election between two funds, where one of them is a *mixed* fund consisting of real and personal estate. For instance, where the testator not only devises, as in the case last supposed, real estate to the heir in tail, but gives him a legacy of 500*l.* and appoints *C.* his residuary legatee. If entire forfeiture be the consequence of the recusant devisee electing against the will, the legacy, it would seem, would fall into the residue, while the surplus of the real estate would devolve upon the heir; but if the same person were heir and residuary legatee, the legacy would not devolve upon him in the latter character, but would go to the next of kin or executors according to circumstances. The Editor is not aware of any case, in which the next of kin or executors have claimed the residue, where the residuary disposition has failed in consequence of the residuary legatee having forfeited that interest under the doctrine of election.

Upon the whole, therefore, the following questions appear to be still unsettled; namely, whether the recusant devisee or legatee forfeits *all* interest under the will, or only a *part* sufficient to make compensation to the disappointed devisee: and if forfeiture of the whole takes place, whether the surplus, being real estate, belongs to the disappointed devisee, or devolves, as undisposed of, to the heir.

The *mode* of carrying into effect the compensation to be made to the disappointed devisee, varies according to the circumstances of each case, or the arrangement of the parties.

(*t*) See *Tibbits v. Tibbits*, *Streatfield v. Streatfield*, *ubi supra*.

Of the effect or
consequences
of election.

Sometimes the recusant devisee is decreed to convey the whole of the property devised to him, to the disappointed devisee, as in the case of *Ardesoife v. Bennet*. See also *Vane v. Lord Dungannon* (u).

Sometimes the recusant donee is decreed to convey only part, equal in value to the estate devised to the disappointed devisee, as in *Bor v. Bor* (x), or to pay an equivalent in value, as in *Tibbits v. Tibbits* (y). For an instance of the pecuniary value being paid to the disappointed devisees under an arrangement between the parties, see *Pulteney v. Darlington* (z).

At other times, the interest of the recusant devisee is sequestered for the purpose of making compensation, as in *Webster v. Mitford* (a), where the life interest of the widow was directed to be applied during her life to supply the deficiency which her election had created; and in *Streatfield v. Streatfield* (b), the rents of the life estate, devised to the heir electing against the will, were directed (subject to the maintenance of the heir during minority) to be invested during his life in the purchase of freehold estates, of which so much as should be equal in value to the settled estates devised to the testator's daughters in fee should be conveyed to them, and the surplus to remain upon the trusts of the will (c).

(u) 2 Scho. & Lef. 118.

(x) *Ubi supra*.

(y) *Ib.*

(z) *Ib.*

(a) *Ubi supra*.

(b) *Ib.*

(c) *Ib.*; see also *Lewis v. King*,
2 Bro. C. C. 600.

CHAPTER XXIV.

Of the residuary Personal Estate.

WHERE the testator names (a) a *residuary legatee*, he will be entitled in general, not only to what remains after payment of debts and legacies, but also to whatever may by any casualty happen to fall into the residue, after the date and making of the will (b). If the testator neither makes any disposition of the residue, nor appoints an executor, the residue belongs of course to the *next of kin*. If the testator previously to the statute of the 1 Wm. 4, c. 40, made no disposition of the residue, but appointed an executor, the right to such residue legally devolved upon such executor. Nevertheless, if the testator's intention were clearly expressed or inferible from the will, that the executor should not take *beneficially*, he would in equity be held a *trustee for the next of kin*; and the residue would be distributable among them according to the statute (c), notwithstanding the testator's personal estate, had he died intestate, would have been distributable according to the customs of *London* or *York*, and not according to the Statute of Distributions (d): but if there were no next of kin, then he would be a trustee for the Crown. But where executors were appointed, and the intention to exclude them was not apparent on the will, nor inferible according to the construction of the Court, there the legal right of the executors prevailed.

But, although the will raised an inference or presumption in favour of the next of kin, such inference (unless it arose from express words, or unequivocal demonstration of intention to impose an office merely, and not a benefit) would not have

(a) The mere naming of a person as residuary legatee will carry the residue to such legatee; *Warren v. Postlethwaite*, 2 Coll. (C.), 116, 123; see also *Evans v. Croshie*, 11 Jur. 510.

(b) *Bird v. Le Fevre*, 15 Ves. 589; *Roberts v. Cooke*, 16 Ves. 451; *Smith v. Fitzgerald*, 3 Ves. & Bea. 3; *Leake v. Robinson*, 2 Meriv. 392;

Bland v. Lamb, 5 Mad. 412.

(c) 22 & 23 Car. 2, ch. 10, explained by 29 Car. 2, ch. 20.

(d) *Wheeler v. Sheer Mosely*, 288, 302; *Wulton v. Walton*, 14 Ves. 324; *Wilkinson v. Atkinson*, 1 Turn. 255; *Fitzgerald v. Field*, 1 Russ. 416, 423, and the cases cited by Sir John Leach, V. C.

precluded the executors from producing *parol evidence* to rebut such presumption, raised in favour of the next of kin; nor, in such case, would the next of kin be prevented from encountering the evidence adduced by the executor, by other proofs in support of the presumption in favour of them, the next of kin. On the other hand, if the will raised no inference against the executor, and in favour of the next of kin, the latter would not be allowed to produce evidence against the executor's legal right (*e*).

But a very important alteration has been made in the law respecting the rights of executors to the undisposed residue of testator's dying after the 1st of *September*, 1830. The act of 1 Wm. 4, c. 40, has abolished the old rule above noticed in favour of executors, and enacted its converse, namely, that executors shall in all cases be trustees for the next of kin, in respect of the residue undisposed of, unless it shall appear by the will or codicil, that the testator meant they should take beneficially. This enactment it will be seen, affects more or less from thirty to forty classes of cases discussed in the present chapter; and with respect to wills of testators dying after the 1st day of *September*, 1830, will, in a great measure, prevent the recurrence of the numerous perplexing questions which have arisen upon this complicated branch of the law of legacies (*f*). Still, however, some of those cases may be resorted to for the purpose of establishing an intention in favour of the executors.

The words of the act are, "That when any person shall die after the 1st day of *September* next after the passing of this act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors, shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any), who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of; unless it shall appear by the will, or by any codicil thereto, the person or persons so appointed executor or executors, was or were intended to take such residue beneficially." And the act further provides, "that nothing herein contained shall affect or prejudice any right to which any executor, if this act had not been passed, would have been entitled, in cases where there is not any person

(*e*) Upon this subject of *parol evidence*, see Vol. I, Chap. IV. sect. II. sub-sect. 3, 4.

(*f*) See Sir *Will. Grant's* observations in *Pratt v. Sladden*, 14 Ves. 197, *infra*, sect. III. sub-sect. 3.

who would be entitled to the testator's estate, under the Statute of Distributions, in respect of any residue not expressly disposed of" (g).

The before-mentioned general rules, with their exceptions, and other details closely connected with them, as they relate more especially to wills of testators dying before the 1st of *September*, 1830, will be discussed under the following arrangement.

SECT. I. Rights of the residuary legatee to the residue of the testator's personal estate.

1.—*Where he is general residuary legatee.*

2.—*Where he is only partially residuary legatee.*

First. *Where the residue is given after payment of debts and legacies.*

Secondly. *Where the residue is only of part of the testator's effects, and not the general residue.*

SECT. II. Rights of the next of kin to the undisposed of residue of the personal estate.

1.—*Where a legacy is given to the sole executor; or when two or more executors, and equal legacies are given to them.*

A.—*Notwithstanding legacies are also given to the next of kin.*

B.—*And notwithstanding the executrix is the wife of the testator, or other near relation.*

C.—*Unless what is given to the wife is her own property.*

D.—*And notwithstanding the legacy to the executor is reversionary.*

E.—*But otherwise, if the reversionary legacy be contingent: sed qu.*

2.—*When legacies are given to executors for care and trouble.*

3.—*When executors are called executors in trust, or when the residue is bequeathed to them in trust, and declaration of trust wholly omitted.*

(g) See *Andrew v. Andrew*, 1 Coll. (C.), 686, in which the executors failed in an attempt to establish their right

to the residue against the next of kin claiming under the above statute.

4.—*Where the residue is bequeathed to executors in trust, and the trusts are not sufficient to exhaust the whole fund.*

Secus, where executors are named trustees for specific purpose only.

5.—*Where, though the executors are not called executors in trust, the testator uses other expressions, shewing an intention to impose a duty on them, and not to give a benefit.*

6.—*Where the residue is originally given away, and the whole or part lapses.*

Secus, where specific or general legacies lapse: sed qu.

7.—*Where the residue is attempted to be disposed of by an imperfect instrument.*

Secus, where the intention to dispose of the residue is uncertain.

8.—*Where the residue is bequeathed to the executor for life.*

9.—*Where the residue is bequeathed to the executors as tenants in common, and part lapses.*

Secus, where given to them as joint tenants.

10.—*But where one of several executors is a trustee, all are considered so:*

Notwithstanding the property be an estate pour autre vie originally granted to the grantee, his executors, &c., and they take as special occupants.

11.—*But where there are no next of kin, the Crown entitled.*

SECT. III. Rights of executors to the undisposed residue of the testator's personal estate.

1.—*Where only one executor, and no legacy, or where more than one executor, and unequal legacies.*

So also whether the legacies are specific or general.

2.—*Where legacies to some, and none to the other executors.*

3.—*Where legacy to executor is an exception out of another legacy.*

To the above may be added, in point of arrangement, the following instances discussed in section II.

Rights of residuary legatee.

- 4.—*Where the legacy to the executor is a contingent reversionary interest: sed qu.*
- 5.—*Where the executor is only named trustee for a specific purpose.*
- 6.—*Where the intention to dispose of the residue is uncertain.*
- 7.—*Where the residue is bequeathed to the executors as joint-tenants, and the share of one or more, lapsing, survives to the rest.*

SECT. IV. Of the admissibility of parol evidence.

- 1.—*By the executor, and herein of its nature.*
- 2.—*By the next of kin.*
- 3.—*Where inference of intention in favour of the next of kin is doubtful.*

SECT. I. Rights of the residuary legatee to the residue of the testator's personal estate.

First, where the residuary legatee is general legatee, he is entitled not only to what remains after payment of debts and legacies, but also to whatever may by lapse, invalid disposition, or other casualty, fall into the residue, after the date and making of the will (*h*).

1. Where he is general and not partial residuary legatee.

Thus, in *Durour v. Motteux* (*i*), *Timothy Motteux* devised all his real estates to trustees, to sell and dispose of the whole, with his personal estate, for payment of his debts and legacies, and performance of his will. Among other legacies, he gave 1,200*l.* to be invested in the purchase of freehold lands for charitable uses; and directed his trustees to place out all the residue of his estate upon securities, and divide the same among several persons. The legacy of 1,200*l.* being void by the Statute of Mortmain, the question was, whether it should go to the heir or residuary legatees? and Lord *Hardwicke*, C., decided that it

(*h*) *Bird v. Le Fevre*, 15 Ves. 589; *Roberts v. Cooke*, 16 Ves. 451; *Smith v. Fitzgerald*, 3 Ves. & Bea. 3; *Leake v. Robinson*, 2 Meriv. 392; 5 Mad. 412.

v. Heath, *supra*, p. 495; *Androvin v. Poilblanc*, and *Clennell v. Lewthwaite*, *infra*; *Green v. Jackson*, 5 Russ. 35, aff. 2 Russ. & M. 238; *Salt v. Chataway*, 3 Beav. 576.

(*i*) 1 Ves. sen. 320; see also *Oke*

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belonged to the latter; observing, “ I am of opinion, the money that should arise by sale of this real estate is turned into personal by the testator, and so intended; it plainly appearing, that by the description of *all* his personal estate he meant to include the whole in the residue; so that it is to be considered now as personal. For several cases in which this Court has determined land, directed to be converted into money, are to be so considered; and *è contra*. Then it comes to this: a will is made, in which several legacies, and the residue of the personal estate, are given away; one of the personal legacies void by law. The Court cannot say for that reason, contrary to the express will, that he intended to die intestate; for giving the residue over includes every thing, let it fall in by reason of that legacy’s being void, or lapsing by dying in the life of the testator.”

In *Kennell v. Abbott* (*j*), a marriage ceremony had been performed between *Catherine Hickman* and *Edward Lovell*, whose wife, unknown to *Catherine Hickman*, was living. Under a power in the settlement made upon that occasion, she devised her copyhold estate to her brother, *Thomas Abbott*, in trust to sell, and pay out of the purchase money several legacies, and, in particular, a legacy of 150*l.* to her husband, *Edward Lovell*. The testatrix also gave her household goods, plate, furniture, and stock in husbandry, to her said brother, in trust to sell, and apply the produce to a particular purpose; and as to the *residue* of the purchase money arising from the sale of her copyhold estate, household goods and furniture, and all the rest, residue and remainder of her monies, securities for monies, personal estate, and effects whatsoever and wheresoever, that she should die possessed of, interested in, or entitled to, or whereof she had power to dispose by will, she gave to her niece, *Betty Kennell*, subject to her debts and funeral expenses. The question arose upon the legacy to *Edward Lovell*, who survived the testatrix, whether it were void; and, if so, whether the residuary legatee, the heir, or the next of kin, were entitled to it? Lord *Alvanley*, M. R., decided, that the representative of *Edward Lovell* could not claim the legacy, on account of the gross fraud practised on the testatrix; that the real estate was to be considered converted into money; and that, part of it not being well disposed of, the residuary clause gave, not only every thing not expressly disposed of, but also every thing lapsed, or by any means not disposed of, to the residuary legatee.

Again, in *Cambridge v. Rous* (k), a testatrix bequeathed to her niece, *Martha K. Van Mierop*, 2,000*l.*, four *per cent.* annuities, and also her plate, diamonds, jewels, household furniture, linen, wearing apparel, and any old coins the testatrix might be in possession of at the time of her death; she then gave the residue of her property and effects, whether in money or in the public funds, or other securities of any sort or kind whatsoever, to be divided equally, one moiety whereof she bequeathed to her niece, *M. K. Van Mierop*. The other moiety she gave to the defendant *Rous*, in trust to invest in the public funds, or other securities, and to pay the whole of the annual dividends, &c., to her sister, *M. K. Van Mierop*, for life; and after her death, to the testatrix's niece, *Cornelia Cambridge*: and at her decease, to her children (if any), in equal proportions; or if only one child, the whole to that child; and the principal to be paid to the survivor or survivors of such child or children in equal shares, as they respectively attained twenty-one; but if *Cornelia Cambridge* should die leaving no child, or there being such, they should die before twenty-one, then she directed that the principal of the aforesaid moiety, left in trust, should be paid to her niece, *M. K. Van Mierop*, if she should be living at the death of her sister, *Cornelia Cambridge*, dying without children, or at the time of the decease of the children before twenty-one: but should her niece, *M. K. Van Mierop*, not be living at her sister's death, or at the decease of the children, as before mentioned, the testatrix directed her trustees to dispose of the said moiety, in the same manner, and to the same persons, that her niece, *M. K. Van Mierop* should have disposed of her own property by will. The testatrix then proceeded in this manner; "should it so happen that my niece, *M. K. Van Mierop*, should die before me, I then will and direct, that the whole residue of my property, which was directed to be divided in equal moieties, should go altogether in trust to the said *T. B. Rous*, his heirs and assigns, to be held by them in trust for the purposes as before described; and to be disposed of, both interest and principal, in the same manner, and in the same way, to all intents and purposes as the money before described, viz., after the decease of my sister, *M. K. Van Mierop*, widow, and of my niece, *Cornelia Cambridge*, without children, or of the decease of all the children of my said niece, *Cornelia Cambridge*,

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Generally and not partially.

 (k) 8 Ves. 14, 25.

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before they may have attained the age of twenty-one, the whole to be disposed of by the trustees to the same persons, and in the same manner as my niece, *M. K. Van Mierop*, may have disposed of her own property by any will or testament she may have left." *M. K. Van Mierop*, the niece, and *T. B. Rous* died in the life of the testatrix. After the death of the testatrix, *Cornelia Cambridge* took out administration, with the will annexed. A question arose whether the particular legacies, lapsed by the death of *M. K. Van Mierop*, fell into the residue, and passed by the residuary clause or belonged to the next of kin; and Sir *William Grant*, M. R., decided that they passed by the residuary clause. His Honor observed, "It has been long settled, that a residuary bequest of personal estate (for it is otherwise as to real), carries, not only every thing not disposed of, but every thing that in the event turns out not to be disposed of: not in consequence of any direct or expressed intention, for it may be argued in all cases that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him; no, for he does not contemplate the case; the residuary legatee is to take only what is left, but that does not prevent the right of the residuary legatee. The testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee. In case of lapse of real estate, the heir-at-law takes; but in the case of personal property, the residuary legatee is preferred either to the next of kin, or the executor. What difference is there here? There is nothing to distinguish this case. The word '*then*' carries it no farther than the word '*residue*,' which imports 'after the legacies antecedently given.' It might, therefore, be contended in every case. Then the words 'whether in money, or in the public funds, or other securities of any sort or kind whatsoever,' are adverted to, as tending to shew that at least the specific articles were not included. But these are not words of restriction; they are rather words of enlargement. The object was to exclude nothing. Such an enumeration, under a '*videlicet*,' and much more restrictive expression, has been held only a defective enumeration, not a restriction to the specific articles. This is only a common residuary bequest, and therefore it includes, upon settled principles, these legacies which are lapsed."

It is unnecessary to cite the numerous cases which have occurred since the last decision in proof of a principle so well established as that under discussion. Some of them are cited

below (l), and we shall close the present division by the case of *Bland v. Lamb* (m), an instance of the bequest passing property acquired by the testator subsequently to the date of his will.

Rights of residuary legatee.

Generally and not partially.

There *Thomas Bland* by his will, stating himself to be possessed of two sums of stock, amounting together to 63,000*l.*, gave legacies to the whole amount; and, after bequeathing certain specific articles, concluded thus; “anything that I have forgot I leave at the disposal of Mrs. *Bland*; all my wines are her’s.” Mrs. *Bland*, who was also a legatee of 1,000*l.* a year for her life, died before the testator, who afterwards made a codicil containing the following words: “I may have forgot many things, such as money due to me from government, &c. If such there is, it is to be thrown into the lump for the benefit of the legatees, to be paid to them in proportion.” The testator, before his death, acquired further property to a large amount by the death of a relation. A question arose between the legatees and the next of kin, whether the codicil amounted to a general residuary bequest, and would, therefore, embrace this particular property. Sir *John Leach*, V. C., decided that the residue did include it, observing, “The question is, not what the testator had in his contemplation when he made his codicil, but what the words he has used will embrace, according to their ordinary signification, which must prevail, unless qualified by other expressions in the instrument. A testator, when he gives his residue, may contemplate only the actual state of his property at the time, and may mean to give, and may think he is giving next to nothing; but such residuary legatee will nevertheless take an after acquired million.”

From this decision there was an appeal (n), to Lord *Eldon*, C., who expressed his opinion in favour of the judgment of Sir *John Leach*; remarking that he must follow the rule of law; as he did not find any expressions sufficiently definite, to justify him in deciding that the residuary clause should only have a limited effect. In the course of his judgment, his Lordship thus stated the general rule upon the subject under discussion; “Although the general doctrine of the Court is, that if a person gives all the rest of his personal estate or property, such a gift will not only pass that which he then has, but that which may become his property; and it will operate even in this singular way, that

(l) *Bird v. Le Fevre*, 15 Ves. 589; *Roberts v. Cooke*, 16 Ves. 451; *Smith v. Fitzgerald*, 3 Ves. & Bea. 3; *Leake v. Robinson*, 2 Meriv. 392; *Legge v. Asgill*, 1 Turn. 265, in notes, *infra*; see

also *Evans v. Jones*, 2 Coll. (C.), 516; *Wingfield v. Newton*, Ib. 520, note.

(m) 5 Mad. 412.

(n) 2 Jac. & Wal. 399.

Rights of residuary legatee.

Generally and not partially.

although a testator may probably have meant to pass nothing, but what he had at the time of his will, (which alone, according to the common sense of the expression, can be called his property), yet, if at the time of his death he has not a single particle of that property, and has afterwards acquired other property, this last property will pass under the words of my property. The Courts have held, whether on satisfactory grounds or not is another question, that where a person gives all his property, it shows that he did not mean to die intestate; and, not meaning to die intestate, as to what he had at the time of making his will, they have inferred, that he did not mean to die intestate, as to what he should have at the time of his death. This rule has sometimes operated with great hardship, and directly contrary to the intention of the party; but, notwithstanding that, it has been allowed to prevail."

In the case of *Fleming v. Burrows* (o), the reader will find an instance, wherein the words "what else I may then be possessed of at my decease," were considered to pass the general residuary estate to the legatee, though followed by specific bequests and devises to him, and by gifts of general legacies to several other persons.

In *Leighton v. Baillie* (p), the following words were indorsed on a testamentary paper without date, "I think there will be something left to give *W. B.*, now at school, towards equipping him to any profession he may hereafter choose. Sir *John Leach*, M. R., decided that *W. B.* was entitled as residuary legatee under these words.

In *Goodere v. Lloyd* (q), a testatrix having power to appoint 700*l.* secured by a term, appointed that sum by her will to her executors upon trust, but she did not expressly declare any trusts of that sum. She bequeathed her residuary personal estate to her executors upon trust, subject to the payment of her debts and legacies. Sir *L. Shadwell*, V. C., decided that it was well appointed, and formed part of her residuary personal estate.

In *Clowes v. Clowes* (r), a bequest by the testator of all his 'property of every kind soever not specified above,' was held to comprehend the capital of stock directed to be invested by the testator, and of which only the dividends were given in certain proportions to two legatees for life. Sir *L. Shadwell*, V. C.,

(o) 1 Russell, 276; see also *Hearne v. Wigginton*, Mad. & Geld. 119.
(p) 3 Myl. & K. 267.

(q) 3 Sim. 538.
(r) 9 Ib. 403, and see *Ellis v. Maxwell*, 3 Beav. 587.

considered the words to mean *interest not bequeathed* in property which the testator might have before mentioned. Rights of residuary legatee.

The general rights of the residuary legatee to whatever may fall into the residue by lapse, invalid disposition, or other casualty, established by the authorities before referred to, may, however, be qualified where the intention is apparent, and of which instances will be found in the cases of *Martin v. Glover* (s), and *Flinn v. Jenkins* (t). Generally and not partially.

We proceed to consider in the next place.

2. Where the legatee *is not generally*, but only *partially* residuary legatee, he will not, in that character, be entitled to any benefits from lapses, though very special words are required to take a bequest of the residue out of the general rule (u). 2. Where the legatee is not generally, but only partially so.

First, where it appears the testator intended the residuary legatees should have only what remained *after payment of legacies*. 1. Where he is to take the residue after payment of legacies.

Of this class, is the case of *Sir Jermin Davers v. Sir Jermin Dewes* (v). *Henry Lord Dover*, being seised of the manor and manor-house of *Cheevely*, and possessed of effects there, and plate of great value, by his will appointed *Folkes* and other persons, since deceased, his executors, and gave *Folkes* 200*l.* for his trouble. He gave all his plate to his wife for life, five thousand ounces of which were to be at her disposal; and declared he intended to dispose of the residue of his plate by codicil. He then gave *Cheevely* house to his wife for life, declaring he would dispose of the goods and furniture there, after his wife's death, by a codicil to his will; and he gave the residue of his personal estate whatsoever, not before disposed of, or *reserved to be disposed of* by his codicil, to his wife. The testator made two codicils, without disposing of his goods and furniture in *Cheevely* house, or of the surplus of the plate, and died leaving nephews and nieces. A question arose, whether the goods and furniture in *Cheevely* house, and the surplus of the plate, belonged to the testator's widow, as residuary legatee, or to the next of kin, or to *Folkes*, the surviving executor: and Lord *King*, C., said, that those articles were undisposed of by the will, and should go to the next of kin, according to the Statute of Distributions; that it

(s) 1 Col. (C.), 269.
(t) Ib. 365.

(u) 2 Jac. & Wal. 406, per Lord *Eldon*.

(v) 3 P. Wms. 40.

Rights of residuary legatee.

Partially and not generally.

was plain the testator did not intend they should pass by the will, but reserved them to be disposed of by a subsequent codicil; and that, if it were admitted that the testator did not intend to dispose of them by the will, his lady, as residuary legatee, could not thereby be entitled to them; because the devise of the surplus, as penned, was very strong against his giving her the residue of the personal estate, not thereby otherwise disposed of or reserved to be disposed of by the codicil; that the goods in question were reserved to be disposed of by the codicil, and therefore could not pass by the bequest of the residue in the will. With respect to the claim of the surviving executor, his Lordship said, that as *Folkes* had an express legacy of 200*l.* for his trouble, and the rest of the personal estate being disposed of, or at least, intended so to be by the codicil, he was plainly to be considered but as an executor in trust.

Again, in *Attorney General v. Johnstone (w)*, the testator, resident in *Hamburgh*, among other legacies, gave 20,000*l.* to be invested in the purchase of lands for the benefit of a charity; and, after other legacies, disposed as follows: "To the hospital called *Gasthouses*, also in the city of *Hamburgh*, 100*l.* sterling; that is, if there remain enough of my personal estate to satisfy it; but, if not, or in case there remain but little, then the 100*l.* to the *Gasthouses* shall not be paid; and the small remainder of my personal estate shall be left to my executor to dispose of in favour of charity schools in *Hamburgh*, as he shall think proper; so as it is likewise my will, that if my personal estate shall sufficiently reach towards satisfying all the legacies by me bequeathed and above mentioned, that my said executors shall also dispose of the remainder in favour of charity schools in *Hamburgh* in manner before expressed." Upon a question between the magistrates of *Hamburgh*, as guardians of the charity schools, and the testator's next of kin, as to which of them the charity legacy of 20,000*l.*, void by the Statute of Mortmain, belonged, it was contended on the part of the former, that they, as residuary legatees, were entitled to it, upon the principle that the residuary bequest would include not only what was *originally*, but also what by subsequent accidents became undisposed of. Lord *Camden*, C., decided against the claim of the residuary legatees; observing, "The rule is very true in general, that the residue takes in lapsed legacies; the rule as to the real estate is otherwise. But then the residuary

(w) Ambl. 577; see also *Baker v. Hall*, 12 Ves. 497; *Nisbett v. Murray*, 5 Ves. 149.

legatee must be a *general legatee*, to take every thing that does not pass by the will. If the testator had circumscribed and confined the residue, then the residuary legatee, instead of being a general legatee, becomes a specific legatee. If the testator had said, none of the legacies shall on any account fall into the residue, it would have excluded the charities from taking the lapsed legacies. This is proved by the case cited (x). His intention appears strong in this case to confine the residue to what should remain of his money *after the other legacies paid*. If there should not be sufficient to pay 100*l.* to the *Gasthouses*, then he gives that pittance to the charity schools as a residue; or if there should be enough, and a little more, then he gives that little overplus to the charity schools. He clearly meant, that the charity schools should take nothing but a small pittance, if any such pittance should be left. I look upon the residuary devise to be specific, contingent, and conditional; that is, 'in case my estate turns out to pay all my other legacies (which it has not), and there should be a little more, then I give that little' (y).

Rights of residuary legatee.
Generally and not partially.

In *Ray v. Adams* (z), the testator gave several annuities, and, among others, one of two guineas a week to his son *J. D. H.*, the annuities to be provided for by investment in the 3*l.* per cent. consols. The testator directed that, upon the death of his son, the stocks, out of which the annuity to him was made payable, should be sold, and after deducting expenses, the produce paid to his wife, not doubting she would dispose of the same for the benefit of such of his relations as might stand in need; and in case the residue of his estate should be more than sufficient to provide for the annuities, he gave the *surplus* residue to his wife. The widow died in the lifetime of the testator's son, *J. D. H.*; and upon the death of the latter, the question was, who was entitled to the stock appropriated for his annuity. Sir *John Leach*, M. R., decided that the power never vested in the widow, by the events which happened, she not having survived the son; and that, therefore, the testator, not having made any effectual disposition of the fund after the death of his son, he died intestate as to that; and his Honor decided that the testator's next of kin were entitled, the representatives of the widow taking one-third, and those of the son the remaining two-thirds.

The case of *Easum v. Appleford* (a) is a further illustration of

(x) Last case.

149.

(y) See also *Baker v. Hall*, 12 Ves. 497; also *Nisbett v. Murray*, 5 Ves.

(z) 3 Myl. & K. 237.

(a) 5 Myl. & C. 56.

Rights of residuary legatee.

Partially and not generally.

the rule established by the class of authorities cited in the present subdivision, and of which it forms one. There a testatrix, who had funded property of her own, blended with the sum of 3,000*l.* over which she had a testamentary power of appointment, directed the investment of the 3,000*l.*, in the names of trustees upon trust as to 2,700*l.*, to pay the interest to her mother for life; and as to 250*l.* for another person, and as the remainder of the 3,000*l.* upon the trusts of her residuary estate. She then added, "all the residue of *my* stock in the public funds, and all my monies and securities for money, and all the residue of my estate and effects, to trustees upon certain trusts. The mother died in the testatrix's lifetime; and the question was, whether the 2,700*l.*, so lapsing, passed under the above residuary disposition, coupled with the context of the will. Lord *Cottenham*, C., affirming the judgment of Sir *L. Shadwell*, V. C., decided in the negative. His Lordship adverted to the rule under consideration in the following words: "The general rule that a residuary clause passes a lapsed legacy, that which was intended to be the subject of bounty to another, is founded upon this, not that it affects, *in specie*, what the testator intended, for he probably contemplated nothing beyond the particular legacy taking effect, but because the residuary clause is understood to be intended to embrace everything not otherwise effectually given; because, as Sir *William Grant* expresses it, in *Cambridge v. Rous* (b), the testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee: so that, upon failure of the particular intent, the Court gives effect to the general intent. When, therefore, from the construction of the will, the presumption in favour of such general intent is negatived, the rule does not apply, and the lapsed bequest is undisposed of. Such is the case of a residuary bequest to several as tenants in common: the share of one dying in the testator's lifetime does not pass; because the testator having given to each a certain proportion of his property, according to their number, it would not be consistent with such declared intention to give to the survivor a larger proportion. Upon this principle Lord *Camden*, in *The Attorney General v. Johnstone* (c), held that a residuary clause did not pass a legacy which had failed; saying, that, for that purpose, the residuary legatee must be a general legatee to take every thing which does not pass by the will; and that if the testator circumscribes or

(b) 8 Ves. 12.

(c) *Ubi supra*; see also *Hunt v.*

Berkeley, Moseley's Rep. 48, in reference to the second point decided.

confines the residue, the residuary legatee, instead of being a general legatee, becomes a specific legatee.

Rights of residuary legatee.

Partially and not generally.

2. We may in the next place observe, that it sometimes happens that a testator appoints a residuary legatee of a partial residue, and not of the general undisposed of surplus of his personal estate, in which case, of course, the residuary legatee of such partial residue will not be entitled to lapsed interests falling into the general residue. As, where a testator directs a certain leasehold house, and the furniture and effects thereto belonging, to be sold, and out of the produce certain legacies to be paid, adding words to this effect, "if any thing remains," or, "what is left to *B.*;" in such case *B.* will only be entitled as residuary legatee of the fund specified, and not of the general residue.

2. Where the residue is only of a part of the testator's effects, and not the general residue.

Thus in *Cook v. Oakley* (*d*), the testator being on board ship, by his will gave to his mother (if alive), his gold rings, buttons, and chests of clothes, and to his friend *F. G.*, (who was on board with him) his red box, arrack, "and all things not before bequeathed," and made him sole executor. At the time of making his will, he was entitled to a share of a leasehold estate by the will of his father, of which he was ignorant. It was decided that the executor was not general residuary legatee; but that under the words, "all things not before bequeathed," he was entitled only to the residue of things *ejusdem generis*, with those before bequeathed (namely), such things as were in the ship; and, therefore, that the executor was a trustee of the leaseholds, as the surplus undisposed of, for the testator's next of kin.

The case of *Ommanney v. Butcher* (*e*), is a further illustration; there the testator bequeathed to Sir *Francis M. Ommanney* and *Andrew Edge* unequal legacies of stock; and after several legacies to charities, requested Sir *F. M. Ommanney* and *A. Edge* to be the executors of his will, and gave them, as such, one hundred guineas each. The testator then directed his books, jewels, plate, and household furniture, to be sold; and, after desiring his clothes to be divided among his servants, and giving to several persons, among whom were his executors, five guineas each for a ring, he continued, "in case there is any money remaining, I should wish it to be given in private charity." The question was, who was entitled to the residue? Sir *T. Plumer*, M. R., was of opinion, that the executors could not take the residue for their own use, equal legacies being given to them, and given to them as ex-

(*d*) 1 P. Wms. 302, and note (3). (*e*) 1 Tur. & Rus. 260, *supra*, p. 1241.

Rights of residuary legatee.

Partially and not generally.

ecutors; that the clause, "in case there is any money remaining," &c., did not apply to the general residue; and that the bequest to private charity was too indefinite to give the Crown jurisdiction, or to enable the Court to execute the trust, and consequently that the sum went to the next of kin.

In *Hastings v. Hane* (*f*), the question was, whether a bequest "that *A.* and *B.* may equally divide any monies which *may remain to my account*, after payment of the aforesaid sums and my debts," was a disposition of the general residue of the testator's personal estate. It was stated in the defendant's answer, that Sir *John Nicholl*, the Judge of the Ecclesiastical Court, had decided that the bequest carried the general residue to the defendant, and on that ground had decreed that letters of administration should be granted to him. Upon a reference, the Master found, that the testator, at the date of his will and subsequently up to the time of his death, had accounts with Messrs. *Coutts & Co.* and *Others*: Sir *L. Shadwell*, V. C., said, that he was not bound by Sir *John Nicholl's* judgment, as he did not know that Sir *John* had before him the circumstances which were found in the Master's office. His Honor further observed, he did not consider that the case of *Hotham v. Sutton* (*g*) bore on the principal case; that the testator had not said any monies which may remain, but "any monies which may *remain to my account*;" that he was bound to give a meaning to the latter words, and therefore he was of opinion, that *A.* and *B.* were not general residuary legatees, but only legatees of the balance.

The partial residuary legatee, however, will be entitled to legacies which were a charge upon the partial residue and which lapse.

Thus in *Malcolm v. Taylor* (*h*), the testatrix, among other legacies, gave 2,000*l.* to *M. A. M. Malcolm*, to be a vested interest at the age of twenty-one: she then gave all the residue of her money in the funds, after payment of the legacies before bequeathed, to *John Malcolm* for life. The general residue of her personal estate, the testatrix gave to *E. G. Taylor* and *M. Taylor* equally. *M. A. M. Malcolm* died under twenty-one; and one of the questions was, whether the 2,000*l.* lapsed in favour of the partial residuary legatee, *John Malcolm*, or the general residuary legatees. Sir *John Leach*, M. R., decided in favour of the former,

(*f*) 6 Sim. 67.

(*g*) 15 Ves. 319, 327.

(*h*) 2 Russ. & M. 416, 422, 448,

and see per Lord *Cottenham*, C., in *Easum v. Appleford*, 5 Myl. & C. 56, 60, and *Cook v. Oakeley*, *ubi supra*.

and Lord *Brougham*, C., confirmed the decision. The last case seems to be analogous to that of a devise of real estate to *A.* in fee, charged with a legacy to *B.*, upon whose death in the *testator's lifetime the legacy lapses in favour of A.* (i). Rights of next
of kin.

In *Wrench v. Jutting* (j), the testator bequeathed to *A.* his household furniture, and other like things, "and all other goods of whatever kind;" and he appointed that certain specified monies should be divided as follows: after all his debts should be paid off. He then specified certain legacies, and proceeded "three or four thousand pounds or whatever remaining sum or sums to *A.*;" the question was, whether the latter words constituted a gift of the general residue to *A.*; and Lord *Langdale*, M. R., decided in the negative.

The case of *Legge v. Asgill*, cited in *Ommanney v. Butcher*, and reported in a note thereto (k), is an instance where words in a will, "I believe there will be sufficient money left to pay my funeral expenses," and in the codicil, the words "if there is money left unemployed, I desire it may be given in charity," were held to pass the general residue, which included the sum of 2,500*l.* trust monies, in which the testatrix had a vested reversionary interest, subject to be divested by her mother's appointment.

The reader is here referred to Chapter IX. Section 2, where the rights of the residuary legatee to the net produce arising from the sale of real estate were discussed.

SECT. II. Rights of the next of kin to the undisposed of residue of the personal estate.

We proceed to consider the rights of the *next of kin* to the residue of the personal estate undisposed of by the testator. Rights of next
of kin.

Although the executor had before the 1 Wm. 4, c. 40, *prima facie*, the legal right to the residue undisposed of, Courts of Equity, in many instances, interfered to prevent the executors, in that character, from deriving any benefit from their legal right, where the least inference could be collected from the will, that the testator did not intend them any advantage or emolument by the appointment to that office. It may, however, be thought questionable, whether such interference (although done with a view to effectuate the intention of particular persons) has not been attended with greater inconvenience to society, from the multiplication of suits, and the uncertainty and intricacy of the

(i) *Supra*, 499, 515, and 4 Ves. 811, per M. R.; see also *Cook v. Stationers' Co.*, 3 Myl. & K. 262. (j) 3 Beav. 521. (k) P. 265.

Rights of next
of kin.

Where sole ex-
ecutor a legacy
given; or,
when more
than one, equal
legacies to
them.

law upon the subject, than would have occurred if the plain legal rule had been allowed to prevail without exceptions.

It may be inferred, from the case of *Hills v. Brewer*, (1), that Courts of Equity, in their early attention to this subject, were delicate about infringing the rule of law upon particular circumstances. In the case alluded to, a person, by will, after bequeathing several legacies, appointed *two persons*, not related to him, *executors*. The testator lived many years afterwards, and had *several children* born subsequently to the making of his will, but died without revoking, altering or republishing it. The bill was filed to make the executors trustees of the residue undisposed of for the next of kin; but the then Lord Commissioners refused to declare the executors trustees, and dismissed the bill without costs. If slight circumstances had then been allowed to divest the legal right of the executors, the above case might have been considered favourable for such interference, as the executors were strangers, and the claimants the children of the testator, in whose behalf a reasonable inference of intention might have been raised, sufficient to convert the executors into trustees.

But many cases having arisen respecting the claims of the executors and next of kin to the undisposed residue, several distinctions have been established in favour of the next of kin; to which the reader's attention will be directed in the present section.

1. Where le-
gacy to sole ex-
ecutor; or,
when more
than one, equal
legacies given
them.

1. And *first*, if there were one executor, and a general or specific legacy given to or in trust for (*m*) that one: or if there were two or more executors, and equal legacies be given to them, as executors; such bequests have been considered evidence of intention to exclude them from taking the surplus beneficially; upon the reasoning that the gift of *part* of the residue is inconsistent with the intention to give the whole, and notwithstanding the legacy is a reversionary interest; though, if it were likewise *contingent*, it seems that it would not exclude the executor. *Sed qu.*

In *Foster v. Munt* (*n*), *John Markham* bequeathed particular legacies to his children and grandchildren, and 10*l.* a piece to *Munt* and *Symonds*, whom he made executors, for their care. The surplus being 5,000*l.* and upwards, the question was,

(1) 2 Vern. 104.

(m) 2 Atk. 46.

(n) 1 Vern. 473; 7 Bing. 628.

whether the surplus should be a trust for the children, or go to the executors; and it was decreed a trust for the children.

Rights of next of kin.

In *Lord Bristol v. Hungerford* (o), Sir *William Bassett* devised lands to be sold for the payment of his debts, and directed that the surplus should be deemed part of his personal estate, and go to his executors; and he gave to his executors 100*l.* a piece as a legacy. The question was, whether the executors should have the surplus to their own use, or should distribute according to the Statute of Distributions; and Sir *John Trevor*, M. R., determined, that by the gift of the legacies, the executors were converted into trustees of the residue for the next of kin.

Where sole executor a legacy given; or, when more than one, equal legacies to them.

In *Southcot v. Watson* (p), the bill was filed for an account of the personal estate of General *Pulteney*, undisposed of by his will; whereby he gave several annuities out of his stock in the funds; and, among the rest, to *Ann Watson*, an annuity of 400*l.* payable quarterly; and after directing that the dividends due on his public funds or securities should be invested in stock by his executrix, as a further security for the annuities, the testator bequeathed, after the deaths of the annuitants, all his stocks and securities whatsoever to *William Pulteney*, in trust for his son *William*, and such younger sons as he should leave at his death, share and share alike; and if but one, to that one. The will then proceeded: “*Item*, I give to *Ann Watson* all my household goods and furniture (except what is hereinafter excepted), and all my plate, linen, watches, jewels and clothes whatsoever; and I declare the said *Ann Watson* sole executrix.” The exception was of two pictures to the Duchess of *Montague*, and another to some one else. Lord *Hardwicke* decided, that the personal estate undisposed of belonged to the next of kin; in the course of his judgment observing, “The plaintiff and some of the defendants insist, that the executrix was excluded from the surplus, by several legacies being given to her, and that any one of them would have been sufficient to bar her. First, as to the 400*l.* annuity; if it rested upon that, it would admit of great doubt, for the first payment is not to begin till the first quarter day after the testator’s death. So that if she had proved the will, and yet died before that quarter day, she would not have been entitled. It is charged too upon a fund which is liable to other legacies; therefore, the annuity arises by way of charge upon a legacy or by way of exception out of it, like the case of

(o) Pre. Ch. 81; 3 P. Wms. 194,
S. C. in note.

(p) 3 Atk. 226.

Rights of next
of kin.

Where sole ex-
ecutor, a legacy
given; or,
where more
than one, equal
legacies to
them.

Lady Granvill v. The Duchess of Beaufort (q). If given out of the general residue, indeed, it might have been a bar; because, otherwise it would have been giving *all*, and *some*, which is an absurdity. Next as to 'household goods and furniture, and all my plate, linen, watches, jewels, and clothes:' this is a bequest of *specific* things, though under a general description. But yet I am of opinion she is excluded of the residue. Several objections have been made. First, that though a pecuniary legacy will exclude executors, yet a *specific* one will not, and several cases have been cited for this purpose; and it has been said, that the testator might intend, that in case there should be a deficiency of the surplus, she should be secure of the specific legacies. This reasoning would prove too much; it would hold almost as strongly in the case of a pecuniary legacy, for it might be said the testator intended his executor should take something at all events, and not depend merely upon the sufficiency of the surplus."

In *Farrington v. Knightly* (r), *Anthony Upton*, by will written by himself, declared as to his personal estate, if he left any, that he gave 50*l.* to his brother *A.*, 50*l.* to his nephew *B.*, and made *A.* and *B.* executors; and gave 20*s.* a piece to others of his relations, several of whom were his brothers, nephews, and nieces; and, as such, his next of kin, in equal degree, within the Statute of Distribution; after which the testator abruptly broke off, without saying, "in witness whereof," &c., or signing the will, or disposing of the surplus, which amounted to about 1,200*l.* The persons, who were in equal degree of kindred with the executors, filed the bill to have their shares of the surplus according to the statute. Lord *Parker*, C., in giving judgment in favour of the next of kin, observed, "An executor, from his name, is but a trustee, he being to execute his testator's will, and therefore called an executor. In the present case the testator is not to be looked upon as dying intestate, but to have made the executor a trustee of the surplus." His Lordship further remarked, "This differs from other cases, by reason that the will seems to be left incomplete. It had been natural for any testator, especially for a lawyer, as this was, to have said, 'In witness whereof I have set my hand;' and this will, though it has a date, yet it is not signed, nor has it the usual conclusion; so that probably if the testator had not been interrupted, he would have gone on and disposed of the surplus; but as he has

(q) 2 Vern. 648, *supra*.

(r) 1 P. Wms. 544.

not done so, it seems to be left undisposed of; for which reason it ought to go according to the Statute of Distribution, as I think it would if the clause of a will disposing of the surplus was rased and become not legible. It is highly proper the law should be settled one way or other in this case, though no great matter which way, so it be but known." Upon a subsequent day, his Lordship having been attended with precedents, said, "Upon the whole, here being an express legacy of 50*l.* to each of the executors, and no disposition of the surplus of the personal estate, the executors are but trustees with respect to such surplus, which must go to the next of kin, according to the Statute of Distribution."

Rights of next of kin.

Where sole executor, a legacy given; or, where more than one, equal legacies to them.

Again, in *Knewell v. Gardiner* (*s*), a will was begun, and by it several legacies given to the next of kin, and likewise to the executors; and then at the beginning of the next sentence the will stopped, and was left unfinished. Lord *King*, C., said, "The testator having given the executors a legacy, it is most likely he would have given away the residue from them;" and his Lordship decreed the undisposed residue to be distributed according to the Statute of Distributions.

In *Holford v. Wood* (*t*), Dame *Elizabeth Wood*, by will reciting that all the copyhold lands late of *William* and *Thomas Ewer* had been duly surrendered to the uses of her will, and that she had power of disposition over certain leasehold premises, household goods, furniture, and personal estate, lately belonging to the same two persons, gave, limited, and appointed the copyhold and leasehold premises, household goods, furniture, and personal estate, unto Sir *F. L. Wood*, his heirs, executors, &c., for his and their own use and benefit, subject only to the payment of the legacies and annuities therein given: and she appointed Sir *F. L. Wood* sole executor. By a codicil written upon the same paper, and in the testatrix's handwriting, but without a date, she bequeathed thus: "I give to Sir *F. L. Wood* 8*l.* a year long annuities, 14*s.* 8*d.* for the life of Mrs. *Ewer*, at her death, at the disposal of Lady *Wood*, which I give to Sir *F. L. Wood*; also the household goods, furniture, plate, books, and linen to his heirs, administrators, and assigns, at the house in *Lower Grosvenor-street*, which is out in 1800." Upon the bill of the next of kin, one of the questions was, whether by the disposition in favour of the executor, he was a trustee of the residue for the next of kin?

(*s*) Gilb. Eq. Rep. 184; also *Petit v. Smith*, *infra*, sect. IV.

(*t*) 4 Ves. 78.

Rights of next
of kin.

Where sole ex-
ecutor, a legacy
given; or,
where more
than one, equal
legacies to
them.

Lord *Alvanley*, M. R., decided in favour of the next of kin, observing, in the course of his judgment, "In this case the testatrix has, by the codicil, given part of the residue to the executor. It is clear she did not think that by making him executor, she had given him every part of her personal property. That part which she thought had not passed she has by express words given to him. He is barred by the specific legacies in the will, and more by those in the codicil. If the testatrix thought she had given him the whole, she would not have given him part by way of specific disposition."

In *Abbott v. Abbott* (u), the testator bequeathed to *William Abbott*, his eldest brother, 10*l.*, and to his four children 10*l.* each; and, among several other legacies given to his relations, he bequeathed the following: "The said *W. Ellington* to have 5*l.* for mourning, and to my brother *S. Abbott*, 20*l.*; and to my brother *Joseph Abbott*, of *Froom*, 10*l.*; 'and to five persons by name' one guinea each for a ring, and to my nephew *James Abbott* whole and sole executor." The only question was, whether the defendant *James Abbott*, the executor, who was one of the four children of *William*, was entitled to the residue beneficially, or was a trustee for the next of kin? Sir *William Grant*, M. R., after suggesting that the construction of the last clause might be to give the executor a guinea for a ring, finally decided that he should be a trustee for the next of kin; observing, that it would be too much in such a case to give him the residue beneficially.

In *Langham v. Sanford* (v), the testator gave to *John Sanford*, his sole executor, 10,000*l.*, with his furniture; and he was held to be a trustee of the residue for the next of kin; the parol evidence raising no intention in his favour.

In *Ommanney v. Butcher*, before (w) cited, the legacies of stock were 800*l.* Bank stock to Sir *F. M. Ommanney*, one of the executors for his life, and after his death to his children, and 300*l.* three *per cents.* at his own disposal; and to the other executor, *Andrew Edge* and his wife, the interest of 600*l.* three *per cents.* for their lives, and after their deaths among their children. The testator added, "I request my cousin, the said Sir *Francis M. Ommanney*, and my friend *A. Edge*, to be the executors of this my will," and gave them as such one hundred guineas each. The

(u) 6 Ves. 343; see also *Sir Jermin Davers v. Dewes*, *supra*; *Newstead v. Johnson*; *Androvin v. Poilblanc*; *Nourse v. Finch*, *infra*.

(v) 17 Ves. 435.

(w) Page 1683; also p. 1241; 1 Turn. & Russ. 260.

testator also directed five guineas each to be given to his ex-
 ecutors and others. Sir *John Leach*, V. C., remarking upon the
 expression, "I request my cousin," &c., observed that it was
 easily understood, if it was meant that they should undertake a
 troublesome duty, but was not likely to have been made use of,
 if the testator intended to constitute them his residuary legatees;
 and that, although in the early parts of the will the executors
 were not the objects of equal favour, yet that equal legacies were
 given wherever they were taken up together *as executors*. His
 Honor further observed, that there never had been a case, in
 which executors had been permitted to take the residue for
 their own use and benefit, when equal legacies had been given to
 them, and given to them as executors, and he decided that the
 executors had no claim to the residue, but the question rested
 between the Crown and the next of kin (*x*).

Rights of next
 of kin.

Where sole ex-
 ecutor, a legacy
 given; or,
 where more
 than one, equal
 legacies to
 them.

The preceding cases establish the proposition, that, in general,
 equal legacies given to the executors as such would exclude them
 from taking the residue beneficially in that character; and it
 would seem that the rule was the same if the legacies were given
 by a subsequent instrument, so as to attach a trust upon the
 residue under a prior one, or though the executors might take an
 unequal interest in the real estate, for those circumstances do not
 alter the inference of intention that the testator meant they were
 only to have the office (*y*).

The effect of *unequal* legacies to executors is considered in
 section III.

A.—We may here observe, that the circumstance of legacies
 being given to the *next of kin* did not exclude them from their
 right to the residue undisposed of.

A.—Notwith-
 standing lega-
 cies given to
 the next of kin.

Thus, in *Andrew v. Clark* (*z*), the testatrix bequeathed several
 legacies, but first gave one shilling a piece to her brother and
 sister, and a general legacy of 50*l.* a piece to her two executors.
 The bill was filed by the next of kin, claiming the residue as
 undisposed of; and Sir *John Strange*, M. R., observed, in giving
 judgment in their favour, "It is agreed that the giving a money
 legacy to the next of kin, as well as to the executors, does not
 prevent the next of kin from claiming the residue of the personal

(*x*) See *Southouse v. Bate*, 2 Ves.
 & Bea. 396, *infra*.

(*y*) *M'Clelland v. Shaw*, 2 Scho. &
 Lef. 542.

(*z*) 2 Ves. sen. 162; see also *Bay-
 ley v. Powell*, 2 Vern. 361; Gilb. Eq.
 Rep. 225; Pr. Ch. 92.

Rights of next
of kin.

Where sole ex-
ecutor, a legacy
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legacies to
them.

estate. I do not see how this differs from the other cases, for to be sure the Court cannot go upon the vulgar acceptance of the meaning of giving but one shilling. It stands then in the common light; and the rule of law would be, that it belonged to the executors; but it is now settled, that the Court raises an equity for the next of kin. The reason is, first, that by giving the executor a money legacy, the testatrix means to give no more. On the other hand the next of kin are presumed, unless the contrary appears, to be acceptable to her. But whether so or not, the law will not strip them of that benefit, unless there be something to the contrary, nothing of which is here. If I were to give my private sentiment, I should be apt to think, that by giving one shilling, it was the intent not to give more, but I cannot, in a judicial capacity, lay any stress upon that. If it was not so candidly admitted by the counsel for the executors, I should have taken time to have looked into the cases."

Again, in *Kennedy v. Stainsby* (a), the bequest was of a legacy to the executor, and also to the next of kin, and the question was, to whom the surplus belonged; and *Man v. Man* (b), was cited. Lord *Hardwicke*, C., said, "The reasonable rule, which I must approve, and will not disturb, is now established; that a legacy precludes the executor from the surplus; and justly so, to prevent fraud by the maker naming himself executor, which the testator, not aware of the consequences, may permit. Was the maker to appoint a legacy to himself, the testator would be immediately alarmed, and not imposed upon. Now the surplus goes by succession, as it were, under the statute, to the next of kin. As to *Man v. Man*, the Court might have considered, that the testator, by a particular disposition, did not intend the surplus should go to the next of kin; but does not that, seeing he has taken notice of the executor, equally exclude him? I rather believe the decree was upon circumstances now not appearing (c)."

B.—Notwith-
standing the
executrix is
testator's wife.

B.—The circumstance, that the wife of the testator is named executrix, will not, of itself, exclude the next of kin. A distinction, on this ground, appears to have been originally attempted, upon the implied intention of the testator, from the near relationship, subsisting between himself and his wife, to give

(a) 1 Ves. jun. 66, note; also *Far-
rington v. Knightly*, *supra*, p. 1688.

(b) 2 Stra. 905.

(c) See also *Griffiths v. Hamilton*,
12 Ves. 310.

her more extensive benefits by the appointment than to a stranger. In *Ball v. Smith* (*d*), Lord Keeper *Harcourt* seems to have countenanced this distinction, but it is not certain from that case, as reported, whether his Lordship pronounced his decree upon the point alone of the wife being executrix as well as legatee, for there are other circumstances of importance, which occurred in it, to which Lord *Parker*, C., in *Farrington v. Knightly* (*e*) ascribed, the decree in *Ball v. Smith*.

Rights of next
of kin.

Where sole ex-
ecutor, a legacy
given; or,
where more
than one, equal
legacies to
them.

In the latter case, the defendant was the executrix of *Atkins* her first husband; and afterwards married *Smith*, who by will gave her the plate and goods she brought him in marriage, and two silver salvers, in lieu of the plate which had been changed, and appointed her executrix. The testator died, leaving a daughter by a former wife (who married the plaintiff) and the defendant his wife *enceinte* of a daughter. There being no disposition of the surplus of the personal estate, the question was, whether she should take it as executrix to her own use, or it should be distributed? The *Lord Keeper* inclined to decree the surplus to the wife; as well because the will was made before the case of *Foster v. Munt* (*f*), as also that nothing was bequeathed to the wife, but what was her own before, as executrix to her first husband; but principally because, where a wife was made executrix, it was to be presumed she was not made so to have barely an office of trouble, but of benefit; *viz.*, to take the surplus. His Lordship having been attended with precedents, according to direction, said, that there being but the single instance of *Ward v. Lant* (*g*), where the wife was executrix, that she had been excluded from taking the surplus, and the case of *Darwell v. Bennett* (*h*), where two strangers were made executors with the wife, not coming up to the case, he should decree the surplus to the wife, accompanied with this declaration, that he hoped the case would not rest there, but for settling the point would receive the judgment of the House of Peers; and withal he was content it should be admitted in the case, that the defendant Mrs. *Smith*, was not entitled to the goods and plate as executrix of her first husband, but as a legacy given to her by Mr. *Smith*.

Upon the supposition that the judgment in the last case was given upon the reasoning of the wife being executrix and legatee,

(*d*) 2 Vern. 675.

(*e*) 1 P. Wms. 544.

(*f*) *Supra*, 1686.

(*g*) *Infra*, next page.

(*h*) Cited by the Lord Keeper.

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ecutor, a legacy
given; or,
where more
than one, equal
legacies to
them.

it seems impossible to maintain its authority at present, in opposition to other cases upon the subject (i).

Thus in *Randall v. Bookey* (j), *Robert Randall*, having a wife, but no child, and two brothers and two sisters, bequeathed one moiety of a banker's debt to his nephew and nieces, and the other moiety to his wife, whom he made sole executrix. He devised several lands to trustees in trust to permit his wife to receive the profits for life, and then to sell; and out of the produce to pay 100*l.* to his brother *George*, his heir-at-law; 120*l.* to his brother *Thomas*; and 100*l.* to his sisters. The defendant *Bookey* married the widow, and was her administrator; and the Court decided that "the wife by the devise of the moiety of the banker's debt, was excluded from the surplus of the personal estate as executrix; although there was no child, and that legacies were given to the brothers and sisters out of the land, which had not been necessary, unless the testator intended the surplus of his personal estate for his wife, but otherwise had been sufficient to pay those legacies." The surplus was accordingly decreed to go in a course of administration.

In *Ward v. Lant* (k), *Andrew Lant*, by his will in 1673, gave to his wife, whom he made whole executrix, some legacies, but made no disposition of the surplus of his estate. One of the questions was, whether there was any difference, where a wife has a legacy, and was made executrix, and the surplus not disposed of, and where a stranger was; and if she should have the surplus to her own use, though a stranger should not, especially when the will was made in 1673, and the course of distributing the surplus not introduced till long after; and, therefore, not to be carried on in equity, to take it from the widow, when the law was not so at that time. Lord Keeper *Wright* decided: "The widow must distribute the surplus; for though the law was taken otherwise at the making of the will; yet, by subsequent resolutions, the law was declared otherwise, and there had no circumstances intervened to alter the judgment of the Court to what the law was taken to be at that time, as the dying of the testator at the time of the will."

Again, in *Martin v. Rebow* (l), a testator, by his will in 1781, devised to the plaintiff his wife, a real estate, and also bequeathed to her his house in town, his plate, &c. but no pecuniary legacy: and made her executrix. The only question was, whether she

(i) 1 P. Wms. 551.

(j) 2 Vern. 425.

(k) Pre. Ch. 182.

(l) 1 Bro. C. C. 154.

was entitled to the residue of the personal estate in her own right, or only as a trustee, subject to the Statute of Distribution? and Lord *Thurlow*, C., said, "The rule is too fully established to be shaken from time to time. It is better to let it continue unmoved. If it were a new question, it might be argued, but the time is over; the rule is laid down, and has been acted upon for years past, that where the testator gives the executor a legacy, he pays him for his trouble, and turns him, as to the residue, into a trustee. There would be no end to the variety of cases that would arise. An account must be taken, and one-third of the residue go to the wife, the other two to the children."

Rights of next of kin.

Where sole executor, a legacy given; or, where more than one, equal legacies to them.

Lastly, in *Dicks v. Lambert* (m), *John Leach* devised unto his wife, *Ann Leach*, the house, garden, and premises, wherein he dwelt in the town of *Watlington*, in the county of *Oxford*, for her life; adding, "likewise I give, devise and bequeath, unto *Ann Leach*, my loving wife, all my household goods, stock in trade, cash, and securities for cash, book debts and so forth, of what nature or quality soever, for her use and benefit, for and during her natural life; and after her decease, I give, devise and bequeath, my house wherein I now dwell, with the garden and premises, to my brother *Edward Leach*, in trust for all my nephews and nieces, which shall be then alive, to be equally divided among them, share and share alike. Likewise I give, devise and bequeath, unto all my nephews and nieces, which shall be then alive, after the decease of my said wife, 50*l.* a piece out of the securities I now have by me: the profits of it to the use of my wife for her natural life, without any abatement or deduction; she repairing and keeping in sufficient repair the said dwelling house and premises during her natural life, and her executors and administrators so holding it up to *Edward Leach*, his executors or administrators, at her decease, for the uses before mentioned; and likewise to pay the said legacies to *Edward Leach*, or his executors or administrators, in trust for my then living nephews and nieces, share and share alike. Lastly, I make and ordain *Ann Leach*, my loving wife, executrix of this my will and testament, she paying what debts and funeral expenses may be incurred at the time of my death." The testator died in *March* 1791, leaving his wife, his brother *Edward*, and several nephews and nieces, the children of his deceased sisters, surviving him. His widow proved the will; and died in *May* 1791. The bill was filed by

(m) 4 Ves. 725; see also *Southcot v. Watson*, *supra*, p. 1687; *Lake v. Lake*, *infra*, sect. iv.

Rights of next
of kin.

Where sole ex-
ecutor, a legacy
given; or,
where more
than one, equal
legacies to
them.

Edward Leach, and the nephews and nieces of the testator, the children of his deceased sisters, against the executrix of the widow; praying the usual accounts, and a distribution of the residue, as a resulting trust for the next of kin. It appeared that the personal estate, not specifically bequeathed, consisted of a balance of 1,298*l*. due from the defendants, two sums of stock, and debts due on mortgage and bond. Lord *Alvanley*, M. R., decided that the executrix was not entitled beneficially; observing in the course of his judgment, "It is now so perfectly settled, that it is unnecessary to repeat the rule, that making an executor does vest in him the personal estate of the testator, unless a reasonable ground appears upon the will, or as I see I stated in *Clennell v. Lewthwaite* (n), a strong and violent presumption, that the testator did not intend, by making that executor, to vest in him the residue. It was long ago decided, that a legacy of any part of the personal estate, unless there are special circumstances, does afford that presumption, sufficient to bar that general right as executor. The question, therefore, is, when anything is given to the executor, whether it is under such circumstances, as to take away the presumption, arising from part being given to him, that the whole was not intended to go to him as executor. This will bears upon the face of it many doubts. It is by no means so clear, as it has been understood to be at the former hearing, and upon this argument: but upon full consideration of this case, with all the other cases, I am of opinion, that I cannot, without violating the rules which have been laid down, wisely or unwisely, hold, that this testator's widow was entitled to the residue as executrix. The first words of the will seem to relate to real estate. There are words of inheritance. Upon the disposition which follows in favour of the wife, a doubt might have arisen, whether that was a gift of all the residue or not. If it did include the whole residue, it would fall within the rule, which, it is said, upon the former occasion, I laid down; viz. that if the residue be given to the executrix for life, she cannot take it absolutely. But when one comes to see, of what the estate consisted at the testator's death, it is impossible not to hold, that this disposition did include every thing which could possibly be given as residue." In a subsequent part of his judgment, his Lordship added, "But without overturning that rule, that a gift of part to an executor bars him from the whole, a rule that has so long prevailed, whether wisely or unwisely established, I cannot hold this executrix entitled; for

(n) *Infra*, sect. iv. sub-sect. 1.

that would be the effect upon this will. I am, therefore, of opinion upon this will, that she cannot, as executrix, take this residue, part of which is given to her for life only."

Rights of next of kin.

The authorities last stated and referred to, appear to have settled beyond the limits of controversy, that a legacy given to the testator's wife, as executrix, would exclude her from the residue, as well as executors who are strangers, or persons in no degree related to the testators.

Where sole executor, a legacy given; or, where more than one, equal legacies to them.

We may here observe, generally, that there was no sort of presumption to be admitted from nearness or remoteness of kin in the person who is appointed executor, that the testator did or did not intend him the residue (*o*).

Notwithstanding the executor's nearness of relationship to the testator.

C.—But it should here be noticed, that if a man had appointed his wife executrix, and merely given her, as a legacy, *property of her own*, to which she would have been entitled, independent of the will, as choses in action, not reduced into possession at the date of the will, or at his death, or her paraphernalia, it should seem, he would not be considered, by such a testamentary disposition, to have meant to exclude his wife from her legal right to his undisposed residuary estate; and for this reason, such a legacy being confined to personal estate, not belonging to the testator, the inconsistency between the particular gift, and permitting the legatee to take the residue, does not appear, as in instances where the legacy and residue compose the same fund.

C.—But where the testator gave to the wife as a legacy, *property of her own*, she would not be excluded as executrix.

Thus, in *Lawson v. Lawson* (*p*), ——— the appellant's late husband, by his will, charged all his copyhold and freehold estates, as also his personal estates (except 300*l.* which he received as part of the fortune of the appellant, and which was then lent out upon bond to *F. Hylton*, and then undischarged, and which 300*l.* he gave to the appellant, declaring it to be his full intention that it should go entire to her,) with the payment of his debts, legacies, and funeral expenses, and directed them to be discharged by mortgage or sale of such of his said freehold and copyhold lands, as should be sufficient to discharge the same, with all his personal estate (except the said 300*l.*) He also gave the appellant for life, an annuity or yearly rent-charge of 100*l.* to be issuing out of his copyhold estates, (which annuity she was on his death entitled to receive out of such copyhold estate under her marriage articles, though it was not so men-

(*o*) 2 Atk. 46.

(*p*) 7 Bro. Parl. Ca. 511; see also *Ball v. Smith*, *supra*, p. 1693.

Rights of next
of kin.

Where sole executor, a legacy given; or, where more than one, equal legacies to them.

tioned in his will;) and he also left the appellant, so long as she should choose to live in it, his messuage at *Chirton*, with the appurtenances; and after giving some other legacies, he bequeathed to the appellant all her wearing apparel, with her watch and rings, and appointed her sole executrix; but he made no disposition of his residuary personal estate. *F. Hylton* the obligor died in the testator's lifetime, greatly involved in debt, and the testator, with the other creditors, received a dividend of seventeen shillings in the pound, in respect of the bond debt. The testator died, leaving the appellant his widow, and the respondent *John Lawson* and *Mary Nicholson*, his nephew and niece, and only next of kin. The appellant proved the will, and possessed the personal estate of the testator, out of which she paid his debts, legacies, and funeral expenses. *Mary Nicholson* afterwards died intestate, and *William Nicholson* one of her two children, was her administrator. The respondents *John Lawson* and *William Nicholson* filed their bill against the appellant, claiming title with the appellant to the whole surplus of the testator's personal estate, as undisposed of, praying an account and the distribution thereof. *William Nicholson*, having died intestate, the respondent *Mary Stuart* became his administrator. The cause was heard before Lord Chancellor *Bathurst*, who declared that the appellant was to be considered as trustee of the testator's residuary personal estate, beyond the 300*l.* debt specifically bequeathed to her, and that such residue was to be divided, &c. Upon a rehearing before the Lord Chancellor, at the instance of the appellant, his Lordship dismissed the petition of rehearing, and again declared that the appellant was to be considered a trustee of the residue, beyond the 300*l.* debt, and that such residue was to be divided according to the Statute of Distributions, &c. The appellant conceiving that both these decrees were erroneous, appealed from them; and it was contended on her behalf, to be evident from the testator's will, that he did not consider the gift to the appellant of the 300*l.* lent on bond to *F. Hylton*, as any bounty from himself, but merely as her own money, placed out on security for her own benefit, liable to his debts, though not liable to be taken from her by his next of kin; he therefore meant to pen his will, so as to secure to her, what he considered as her own; and made her executrix, that in case he should live to increase his personal estate, she might be beneficially interested by being executrix. It appeared also to have been the testator's intention, that nobody but his wife should be interested in the residue of his personal estate, after payment of his debts, because

every legacy given by the will, was charged upon his real estate in the first instance; and this intention seemed to be founded in justice and reason, as the testator's next of kin were very remote relations, and it could not be supposed, that he meant merely to give his wife trouble, by making her executrix; but which would be the case, if she were not entitled to the surplus. That the legacy to the appellant of her wearing apparel was no bounty from the testator, they being in their nature her paraphernalia; and though liable to his debts, yet, had the creditors taken them, she would have been entitled to satisfaction out of his real estate, whether he had so directed by his will or not. Her counsel concluded with hoping, that both the decrees would be reversed, and the bill of the respondents dismissed; and the Lords declared, after hearing the argument for the respondents, that the appellant was entitled to the residue of the personal estate to her own use. They therefore adjudged, that both the decrees should be reversed; and that the cause should be remitted to the Court of Chancery, to set aside the order of the 18th of *December*, 1771, (which was an order for the appellant to pay part of the residue to the respondents,) and to make such further order as should be just.

Rights of next of kin.

Where sole executor, a legacy given; or, where more than one, equal legacies to them.

D.—Notwithstanding the legacies to the executors were *reversionary*, they would be excluded.

D.—Notwithstanding the legacy to executor was reversionary.

Thus in *Seley v. Wood* (q), the testator, after appointing *Thomas Wood* and *David Fay* executors, and adding, “if they will be so good as to do it,” among other annuities, gave one of 20*L.* to *Sarah Duke*, as long as she might live, adding, “when dead to return to his executors;” and another of the same amount to *Ann Cole* in like manner, also adding, “when dead to go to his executors.” The executors claimed the residue for their own benefit; but Sir *William Grant*, M. R. decided they were trustees for the next of kin, except as to the two sums to which they were entitled. The grounds for his Honor's opinion appear to have been, that if the testator knew it to be law, that upon the expiration of the annuities the capital would go to the executors, why did he mention it in those two instances: while, on the other hand, the declaration in favour of the executors, only in two instances, was evidence of his intention, that they should not take in all the others. His Honor observed, “If as to two of these bequests, he has said the executors should

(q) 10 Ves. 71; see also *Lynn v. Beaver*, 1 Turn. & R. 63.

Rights of next
of kin.

Where sole ex-
ecutor, a legacy
given; or,
where more
than one, equal
legacies to
them.

have the money, and has not said so as to the others, I must say, he meant differently as to those. If he meant they should take in these two instances, then they derive partial benefits under the will; and upon that ground also they are excluded from the residue; for there is no doubt a reversionary interest after a life interest would exclude an executor."

In the case of *Oldman v. Slater* (r), it was decided that a reversionary interest in personalty to an executor afforded a presumption that the testator intended to exclude him from the residue, but that parol evidence was admissible to rebut the presumption.

E.—But where
the reversion-
ary legacy was
contingent: *qu.*

E.—But if the reversionary legacy were to the executor for life, or was otherwise *contingent* in respect of enjoyment, it seems to have been doubtful, whether such a bequest would have excluded the executor. The point was mentioned, though not decided, in *Lynn v. Beaver* (s), for that case was determined upon the evidence adduced by the executor, in support of his claim to the residue. In the last case, the testator gave to his wife for life the annual interest of his property in the funds at his decease, in the little he left in the three *per cents.* reduced, three *per cents.* consols, and four *per cents.* ditto, "not any to be sold out, as I may will it after her decease to her sister *Rachael Beaver*, and my wife's nephew *Richard Beaver*, who I leave my executor to this my will." The testator bequeathed to his wife, for life, the annual profits of his trade, and declared that his wife was under conditions and stipulations for performing what he left to any one he mentioned in his will, whether in sum down or annual stipend for life. The testator then bequeathed the annual profits of his business, after his wife's decease, to *Rachael Beaver* and *Richard Beaver* equally, for life; the survivor to have the whole, upon condition of observing the will and paying legacies: the testator added, "I will and bequeath, as they are the particular heirs of my wife, the stock of shop not to be divided, as I only will the profits or interest to the survivor of the three persons already named." In the course of his judgment, Lord *Eldon* made the following observation: "There is a circumstance in this case which I have not been able to find in any other, that the bequest which raises the presumption against the executor, is a bequest, not simply of a reversionary interest, but of a *contingent reversionary interest*. Observing that it was taken for

(r) 3 Sim. 84.

(s) 1 Turn. & Rus. 63.

granted at the Bar, that the bequest of a reversionary interest would exclude an executor from the residue, I asked whether there were any cases on this subject? I have been referred only to the case of *Seley v. Wood*, decided by Sir *William Grant*, a Judge for whom I must always feel the highest respect. Upon that case I can only say, that it is singular in its circumstances, and I think I may add singular in its decision. I do not intend, by any means, to say that the decision may not be right; but if no more is to be found on the subject of reversionary interests, and particularly of contingent reversionary interests, that is a case which I should find some difficulty in following as an authority in the present instance.”

Rights of next
of kin.

2. Another class of cases, in which there was the inference of intention to exclude the executors from the residue, and to make them trustees for the next of kin, comprises those instances wherein legacies, whether equal or unequal, have been given to all, or to one or more of the executors, for their *care and trouble*.

2. When legacy to executor for care and trouble.

Thus in *White v. Evans* (t), *James White* made the following disposition by his will: “It is my will that 3*l.* a year shall be paid to *Richard Bushby*, one of my executors, for his life, *for his care in seeing my will duly executed*. All these legacies to be paid by *Richard Evans* out of the interest of the three *per cent.* consolidated Bank annuities, to be received by him, or whom he shall appoint to pay the legacies, as long as they who are to receive them live, out of the interest of the aforesaid stock, the principal or capital not to be diminished or removed; and the remainder of the interest in that stock, except what is required to pay the legacies, to be the property of *Richard Evans*, during his life only. I desire that he will be charitable with a good part of it, and relieve the careful and industrious poor, not to give any to the slothful and extravagant poor; and at the death of *Richard Evans* or his sisters, or *Richard Bushby*, each of their legacies, at their deaths, to be the sole property of *St. Alphage Society*.” The testator died without issue, leaving his widow surviving him, who filed the bill for an account, and to have a moiety of the residue paid to her. The question was, whether the executors were trustees of the residue for the next of kin, or were entitled to it beneficially; and Lord *Alvanley*, M. R., decided in favour of the next of kin, observing, “I agree to the rule as laid down by the counsel for the plaintiff. Is there any

(t) 4 Ves. 21.

Rights of next
of kin.

When legacy
to executor for
care and
trouble.

case where one executor is clearly a trustee and the other is not? In this case, one is clearly a trustee. The Court will not admit *parol* evidence, where a legacy is given to an executor *for his care and trouble* (u). They have run much against the executors; and have even laid hold of the circumstance of a legacy, which is not the true criterion of the intention, to make the executor a trustee. I cannot possibly declare, that one executor shall be excluded and the other shall take."

In *May v. Lewin* (v), *Beatrice Miller*, by her will in 1717, after payment of her debts, legacies, and funeral expenses, devised her lands and tenements, and the rents and profits thereof, and the produce of all her money and other personal estate, to the plaintiff and the defendant *Lewin* and their heirs, in trust to sell, and pay the interest of the money arising from the sale to her mother for life. The testatrix, after giving some small legacies to be paid after the mother's death, appointed the plaintiff and the defendant executors, giving them 50*l.* a piece *for their trouble* therein; and she made no disposition of the residue. The Court declared the executors to be trustees of the residue for the next of kin.

Again, in *Rachfield v. Careless* (w), the testatrix being possessed of some personal estate, bequeathed to her nearest relations 5*l.* a piece, and made the defendant *Careless*, who was not related to her, sole executor, giving him 5*l.* *for his care in fulfilling her will*, and made no disposition of the surplus. There was some slight proof for the next of kin, who filed the bill for the surplus of the personal estate, as that the testatrix had declared her intentions to be, to give the surplus of her personal estate to her next of kin, in the same manner as her husband had disposed of the residue of his personal estate to his next of kin. But the person who drew the will, swore that the testatrix, at the time of making it, declared her intention, that if she left any surplus, her executor, who had been her very good friend, should have it, for that her relations had been ungrateful to her; and this person swore that the testatrix had directed him to give the surplus to her executor, and that he would accordingly have done this by express words, but that he thought it unnecessary, the law implying as much. *Powis*, J., for the *Lord Chancellor*: "The opinion of the Great Seal has been various and uncertain in this

(u) *Powis*, J. of the same opinion,
in the case of *Rachfield v. Careless*,
infra.

(v) 2 P. Wms. 159, in notes.
(w) 2 P. Wms. 158.

point; but I do not like parol evidence of the intention, and here we have parol evidence on both sides; however, the words of the will seem to declare a trust by giving the 5*l*. legacy to the executor for his care in fulfilling the will, and this goes beyond all parol proof; so that my thoughts at present are, that the next of kin are entitled to the surplus; but as this has been determined different ways, I will take further time to consider of it, and to look into precedents." Upon another day, *Powis*, J., delivered his final opinion, observing, among other things, that the defendant was made executor in the same clause which gave him the legacy, whereby it should seem that the legacy was annexed to the executorship, as all the reward intended for it: and he decreed distribution among the next of kin (*x*).

Rights of next of kin.

When legacy to executor for care and trouble.

But if the legacy to executors for their "*care and trouble*" be a charge upon, or to be paid out of the produce of real estate, it should seem that that circumstance alone will not convert them into trustees for the next of kin (*y*).

3. Another class of cases, in which the executors have been excluded from taking the residue beneficially, and held trustees for the next of kin, is, where the testator expressly calls them executors *in trust*, or the residue is expressly given to them, or to one or more of them, *in trust*, and notwithstanding a declaration of trust is wholly omitted (*z*); or if not omitted, is void for uncertainty (*a*).

3. When executors named trustees, &c.

Thus, in *Pring v. Pring* (*b*), a man made his will, and appointed *A.*, *B.*, and *C.* executors thereof *in trust*; and for a remembrance, and over and above their costs and charges, he gave them 20*s.* a piece. The bill was filed by the widow, alleging that her husband designed, and often declared, that she should have the benefit of his personal estate; but she being aged and infirm, he made the defendants executors in trust for her. One of the defendants denied the trust, but the other two confessed it; and it was insisted for the adverse defendant, that though the will called them executors in trust, and though it

(*x*) See also *Foster v. Munt*, *supra*, 1686, and *Dean v. Dalton*, *infra*, 1706; *Whitaker v. Tatham*, 7 Bing. 628.

(*y*) *McClelland v. Shaw*, 2 Scho. & Lefroy, 542, *supra*, p. 701.

(*z*) See *Milnes v. Slater*, 8 Ves. 295.

(*a*) *Fowler v. Garlike*, 1 Russ. & M. 232; *Hoffman v. Hankey*, 3 Myl. & K. 376.

(*b*) 2 Vern. 99; see also *Robinson v. Taylor*, 2 Bro. C. C. 589; stated p. 528.

Rights of next
of kin.

When execu-
tors named
trustees, &c.

might be collected from the will that the executors were not to have more than 20s. a piece, yet it was not ascertained for whom the trust was, and therefore it should be taken to be a trust for all who could claim under the Statute of Distribution, and not for the wife alone. *The Court* decided, that as the will declared that the executors were in trust only, without expressing for whom, the person might be averred; and that as two of the executors had confessed the trust by their answer, and it had been fully proved that it was the testator's intention, and that he declared the residue a trust for his wife, it was accordingly decreed to the plaintiff, with costs against the above defendant.

In *Bagwell v. Dry* (c), trusts were declared of the residue, but a share lapsed: there the testator bequeathed the surplus of his personal estate unto four persons in equal shares; and made *A. B.* his executor *in trust*. One of the residuary legatees died in the life of the testator, and the question was, to whom his fourth part should belong? Lord *Macclesfield*, C., said, that the testator having devised the residue in fourths, by the death of one of the residuary legatees in his lifetime, that share lapsed, and was as so much of the testator's estate undisposed of by the will; that it could not go to the surviving residuary legatees, because each of them had but a fourth given to them in common, and the death of the fourth legatee could not avail them, as it would have done, had they been joint legatees; for then they would have taken by survivorship; but that, in this case, the residue having been devised in common, it was the same as if a fourth part had been devised to each of the four, which would not be increased by the death of any of them. That the lapsed share could not go to the executor, he being but a bare executor in trust; and, consequently, that it must belong to the testator's next of kin, according to the Statute of Distributions, of which the executor was a trustee for them.

So also in *Read v. Snell* (d), trusts were declared. There the testatrix bequeathed the residue of her real and personal estate to her brother-in-law, *William Snell*, and *Matthias King*, her executors after named *in trust*; the trusts of which she then declared; and Lord *Hardwicke* said, that as the executors were made *trustees*, and therefore, from the nature of the thing, could take nothing for their own benefit, unless by particular bequest, they had no

(c) 1 P. Wms. 700; also *Bishop of Cloyne v. Young*, *infra*. (d) 2 Atk. 643, 645.

ownership: and therefore could not alter the interest of the *cestui que trusts*.

Rights of next
of kin.

In *Wheeler v. Sheer* (e), reference was made to a subsequent disposition by codicil, which the testator neglected to make. By a codicil to his will, he expressed himself thus: "Whereas I have by my will given the residue to my executors *in trust*, &c., now I do hereby direct and appoint, that the same shall be applied to such uses and purposes as by any other codicil or codicils shall be directed and appointed." The testator made a subsequent codicil, but made no disposition therein of his residue; and the question was, whether the executors or next of kin were entitled; and Lord King, C., decided that the executors were trustees for the next of kin.

When execu-
tors named
trustees, &c.

Again in *Dean v. Dalton* (f), *Ann Joyce*, by her will made in the lifetime of her sisters, *Ann Bewnell* and *Martha Robinson*, bequeathed to the defendants, *F. Dalton*, and *W. Dansey*, all sums of money which she should die possessed of in the public funds, after payment of her debts, &c., to certain uses; she also gave to *F. Dalton* and *W. Dansey*, for their trouble in the trusts reposed in them, 100*l.*, and appointed her two sisters executrixes. *Ann Joyce*, after the death of her sister, *Martha Robinson*, but in the lifetime of *Ann Bewnell*, made a codicil to her will, in which, after taking notice of the death of *Martha*, one of her executrixes, she appointed the defendants, *F. Dalton* and *W. Dansey*, "joint executors with her surviving sister, *Ann Bewnell*, executrix," and ratified her will in all respects not altered by the codicil; she also directed that her executors should be paid all *expenses, journies, and charges* which they should occasionally be put to in the execution of her will and codicil; and that they should not be answerable for each other's default. *Ann Bewnell* died before the testatrix, who soon afterwards died; upon which the defendants proved the will of *Ann Joyce*, and took administration to *Ann Bewnell*. The plaintiffs, the next of kin of the testatrix, claimed her residuary estate, insisting that the defendants took as executors in trust only; on the contrary, the defendants claimed the surplus, as surviving executors; no legacy being given to them by the codicil, in which they were appointed executors with *Ann Bewnell*, and the legacies which were given to them by the will, were so given them only for their trouble in the trusts reposed in them by such will. Lord Thurlow, C., said, "Executors are never paid for trouble and journies, &c., the legacies are their

(e) Mose. 289, 302.

(f) 2 Bro. C. C. 634.

Rights of next
of kin.

When execu-
tors named
trustees, &c.

reward. Here they must be paid for their journies, as other persons are, not merely the money out of the pocket. There is nothing in the argument that it was to give them a prior charge for their expenses, as they must come out of the residuary fund; putting in the words, therefore, is a demonstration of her intention to make them trustees."

The reader is here also referred to the case of *M^cCleland v. Shaw* (g), before stated (h), and in which the testatrix called her executors "*executors and trustees*." A legacy of 20*l.* was given to each of them, "in compensation of the *trouble* they might have in the execution" of her will; and the testatrix directed it to be paid, with other legacies, out of the money arising from the sale of her real estate. There was no surplus of the personal estate, after payment of debts, &c.; and Lord *Redesdale*, not considering there was sufficient indication of intention to raise a charge on the real estate for the benefit of the next of kin, decreed the personal estate to be applied in payment of debts, &c., as far as it would extend; and that the executors were trustees of the surplus of the money produced by the sale of the real estate, (subject to the charges imposed by the will), for the heir-at-law.

4. Where re-
sidue bequeath-
ed to executors
on trust, not
exhausting the
whole fund.

4. It should seem to have been the better opinion, though the subject appears to be attended with some doubt, that the executors were equally excluded, where there was a general bequest of the residue of the personal estate upon trusts which were not sufficient to exhaust the whole property; and that, in such case, the next of kin would have been entitled to the surplus; unless, indeed, it appeared that the testator named the executors trustees, only with reference to a specific purpose, and did not consider them as trustees generally.

In *Robinson v. Taylor* (i), before cited for another point, the testator, after giving several legacies, devised the residue of his real and personal estates to his "executors thereafter named, in trust to sell the real estate, and place the produce at interest, and pay *thereout and out of the remaining part of his personal property*," a particular annuity. He then gave other annuities and legacies, directing the remainder of the money which should be then at interest to continue so; and he merely disposed of it during the life of his cousin, *Mary Stuart*, for her separate use;

(g) 2 Scho. & Lefroy, 538.

(h) Page 701.

(i) 2 Bro. C. C. 588; 1 Ves. jun.

44, S. C.; see also Chap. IX. sect. III. p. 528.

and declared no other trusts. The testator appointed *James Taylor* and *Richard Guest*, executors of his will, "hoping they will see the same duly performed," with the common clauses as to their receipts being discharges, and for their indemnity and reimbursement. By a codicil, the testator gave to *James Taylor*, one of the executors, a legacy of 100*l*. Upon the question between the heir and next of kin, to whom the surplus of the real estate, and between the executors and next of kin, to whom the surplus of the personalty belonged, Lord *Thurlow*, C., decided in favour of the heir, as to the surplus of the real, and in favour of the next of kin, as to the personal estate (*j*).

Rights of next of kin.

Where residue bequeathed to executors on trusts, not exhausting the whole fund.

Lord *Eldon* observes (*k*), upon the above case, "that it would be very difficult to argue upon that mixed devise and bequest, that if the residue of the real estate formed a resulting trust for the heir, the residue of the personal estate would not be so for the next of kin." The subject under consideration was discussed in the case of *Dawson v. Clark* (*l*).

In that case (*m*), *George Forster* bequeathed all his estate and effects whatsoever and wheresoever that he should die possessed of, to *John Wealleans* and *Robert Clark*, their heirs, executors, administrators, and assigns for ever; upon trust, in the first place, to pay, and charged and chargeable with all his debts, funeral expenses, and also the legacies to the several persons thereafter bequeathed. The testator, among other legacies, gave 1,200*l*. for establishing a free school, the said sum to be laid out by his "executors thereafter named" on freehold property, &c.; and he appointed *Wealleans* and *Clark* joint executors. The next of kin filed their bill, insisting that the legacy to the charity was void, and claiming the residue as undisposed of. The executors claimed the residue of the personal estate in two characters; *first*, as expressly devised to them individually, subject only to the payment of debts and legacies; but if not so devised, *secondly*, as undisposed of; and, therefore, belonging to them in their character of executors. Sir *William Grant* expressed his opinion that, though the first point should be decided against the executors, the second must be decided in their favour; and he decreed, that

(*j*) See Mr. *Bell's* note to the above case, 588, and his citation from the Registrar's book, p. 593, n.

(*k*) 18 Ves. 254, in *Dawson v. Clark*, upon appeal from the Rolls.

(*l*) 15 Ib. 409; 18 Ib. 247.

(*m*) 15 Ib. 409; Sir *William Grant*, in the course of his judgment,

distinguished the case before him from *Robinson v. Taylor*, laying stress upon the words, "to my executors hereinafter named" in that case, in which he thought the testator considered the executors as bearing throughout the character of trustees, Ib. 416.

Rights of next
of kin.

Where residue
bequeathed to
executors on
trusts, not ex-
hausting the
whole fund.

the executors took the whole residue, including the 1,200*l*. Upon the question, whether that sum should be included, his Honor observed, "I have always understood, that a general residue of personal property comprehended every thing, *not otherwise effectually disposed of* by the will; and that there is no difference, whether a legacy falls into it by lapse, or as being void at law; and it was not much contended, that, where there is an express bequest of the residue, the next of kin can be entitled to anything. It is, however, supposed, that there is a distinction between residuary legatees, by express bequest, and executors, taking a residue, undisposed of. I am not able to find any such distinction. It lies upon those, who insist upon it, to shew that it is established. I see that in the case of *Pratt v. Sladden* (n), I declared my opinion, that executors, taking the residue, take it precisely in the same plight as residuary legatees would take it; and to that opinion I still adhere."

From the preceding case there was an appeal to Lord *Eldon* (o), who dissented from Sir *William Grant* in his construction of *Robinson v. Taylor*, and referred to other ingredients in that case, which would influence the decision. His Lordship then proceeded thus: "The proposition, that the appointment of executor gives him every thing not disposed of, *is not correct*. In the strongest way of putting that, it can only be what the testator *does not mean* to dispose of; in the case of lapse, for instance, though not disposed of, the executor would not take it: so, suppose that the testator appoints an executor in trust, but does not express his object, he might have relinquished that object, meaning it to go to his executor: yet, in that instance, the will expressing that he intended a trust at that time, the executor would not take in respect of the interest he had by virtue of his office. The difficulties I feel are, first, that I cannot think the distinction between this case and *Robinson v. Taylor* maintainable: secondly, that if the case is to be decided upon the latter ground, I do not apprehend the law of this Court to be, that, if personal property is bequeathed upon trust, and the trust does not exhaust the whole, therefore the executor shall take what is not required for the trust. There is no decision so settling the law. The decisions are the other way. Where, however, the will affects to dispose of both real and personal estate, if the law has been, as it will, I think, turn out, that the trust not exhausting the whole real estate, the devisee will not take beneficially, but

(n) 14 Ves. 193, 199, 200.

(o) 18 Ves. 247.

a trust results to the heir, in the same case it will not be found that the executor can take for his own benefit the surplus of the personal property; that gift to be operated by the mere effect of the nomination of him as executor; and I am not aware of any case where it has been said that if the whole personal estate is given to *A.* as trustee, who is afterwards appointed executor, he shall take beneficially, as executor, what he does not take for the purposes of the trust, he being the legatee of that personal property: that is, there is no case in which the nomination of executor operates as a gift of the personalty beneficially in equity to him; the will containing a bequest of the whole personal estate; and there is no difference whether that is a bequest of the whole personal estate to him, or to another individual. The ordinary case of lapse, that the executor will not take, though the subject is not given to any one else, proves this; that if these legatees had not been the executors, the executors clearly would not have taken the personal estate given to these legatees; and then the question is, whether they shall take it, as they are the executors, though they would not if other persons were the executors. The first point, therefore, is very material, upon which I have not the benefit of the opinion of the Master of the Rolls; and, as to the second, if the judgment cannot be put upon any other ground, I cannot at present say, I am satisfied with the principle upon which it is decided."

Rights of next
of kin.

Where residue
bequeathed to
executors on
trusts, not ex-
hausting the
whole fund.

Upon a subsequent day his Lordship observed: "My great difficulty in this case is not upon the effect of a devise and bequest of real and personal estate to trustees upon trusts, those trusts expressed not exhausting the whole interest; a case upon it is very difficult to maintain; that, as they are afterwards named executors, they are to have what is not exhausted of the property they take as trustees; but the difficulty I feel is, whether I am to construe the words "upon trust" to mean "charged and chargeable," or "charged and chargeable" to mean "in trust." As the Master of the Rolls, however, seems to have laid so much stress upon *Robinson v. Taylor*, I will see the Registrar's book." And, finally, his Lordship affirmed the decree, observing, "The question is, whether upon the whole will this is to be taken as a devise and bequest to these executors, with reference to their office, upon trust to pay; or as giving them the absolute property, subject only to a charge; and I think the latter was the intention" (*p*).

(*p*) See Sir William Grant's observation upon the above case in *Southouse*

Rights of next
of kin.

Where residue
bequeathed to
executors on
trusts not ex-
hausting the
whole fund.

Again, in *Southouse v. Bate* (q), the testator, after giving two legacies of 100*l.* each to *John Forbes* and *Myra Southouse*, to be paid over by them to certain charitable institutions, and equal legacies of stock to them for mourning, also bequeathed to them all his property, both real and personal, “upon this especial trust, that they pay regular the following annuities.” And after giving several annuities, and making other bequests, he proceeded thus: “I do hereby appoint *John Forbes*, my brother-in-law, and *Myra Southouse*, spinster, my sister, both late of *Northampton*, executors of this my last will and testament, and their heirs, executors, and administrators, upon this especial trust and confidence, that they devote all my property, both real and personal, to payment of my just debts, and all the legacies and annuities given by me in trust to them. The executors claimed the residue in equal moieties. For the next of kin it was contended that the whole property being given expressly upon trust, though the trust declared is confined to a particular part, it was impossible to separate the trust from the devise. Sir *William Grant* thought it was impossible the devisees could take any part beneficially; and after observing that a distinction had been attempted to be made, with respect to the personal property, in favour of the executors, on the ground of his opinion in *Dawson v. Clark*, his Honor added: “But there is no opening for the discussion of such a question here as these persons are expressly appointed executors in trust, and equal stock legacies are given to them: and, though these are for mourning, that has been in some cases held sufficient to turn executors into trustees. They are, therefore, trustees both of real and personal estate; and all the co-heiresses are entitled to the one, and the next of kin to the other.”

To the preceding cases that of *Woollett v. Harris* (r) may be added. There *Catherine Collins* bequeathed all her estate and effects whatsoever to *Robert Harris* and *George Lloyd*, and the survivor, his executors, administrators, and assigns, upon trust, after several specific dispositions, as follows: “To my good friend *Robert Harris*, my executor, I bequeath the sum of 50*l.*, and to *George Lloyd*, my other executor, I give and bequeath all my plate, linen, china, and household furniture of every description whatsoever, save and except such as I may hereafter specify in a codicil to this my will:” and, after directing her executors to retain their costs, and declaring that they should not be account-

v. *Bate*, next stated; see also *Wood*
v. *Cox*, per M. R. 1 Keen, 324; S. C.
2 Myl. & Cr. 684.

(q) 2 Ves. & Bea. 396.
(r) 5 Mad. 452.

able but for wilful default, and after payment of her debts, the testatrix gave the residue of her estate to her executors, *upon trust* to pay the proceeds to her brother, *Joseph Collins*, for life; and if he should leave issue, to them. The testatrix appointed *Robert Harris* and *George Lloyd* executors: and by a codicil gave to a legatee certain specific articles. *Joseph Collins* survived the testatrix, and died without issue. The question was, whether the executors took the residue beneficially: and Sir *John Leach*, V. C., decided that they were trustees for the next of kin, observing, "Taking all her estate and effects to have been, in the first place, given to *Harris* and *Lloyd* upon trust, or as mere trustees, the construction of this clause is, that after the trustees have satisfied the legacies, debts, testamentary and funeral expenses, they are then to execute certain trusts as to her residuary estate. It has turned out that the trusts so declared have not exhausted the residuary estate; but considering that the true effect of this will is, that the executors are to take the whole estate and effects upon trust, they are necessarily excluded from all beneficial interest in any part of it, and my decree must be, that as to this residuary estate, they are trustees for the next of kin" (rr).

Rights of next of kin.

Where residue bequeathed to executors on trusts not exhausting the whole fund.

But where the executors were called trustees, with reference only to *specific trusts*, and the intention to exclude them was not otherwise apparent, their legal right would prevail against the next of kin, of which the following case of *Pratt v. Sladden* (s) is an instance.

Secus, where executors trustees only for a specific purpose.

There, *John Cloke* devised a real estate to *Elizabeth* the wife of *Thomas Simmonds*, for life; with remainder to *William Sladden* and his heirs; and after giving to *William Sladden*, his executors, &c. 800*l.* and other legacies to his nephews, bequeathed to the children of his late nephew *Hughes*, the sum of 200*l.* and directed that the said *William Sladden* and *Thomas Simmonds*, thereafter named and appointed, should place out the same at interest for their benefit, the interest to accumulate during minority, and from time to time to be made principal by "his said trustees;" and that "his said trustees," should divide the said legacy when the eldest child should attain twenty-one. After other legacies, the testator gave 400*l.* to the said *William Sladden* and *Thomas Simmonds* and the survivor, his executors, &c. upon trust

(rr) Sir *John Leach*, in the course of his judgment, referred to the case of *Dawson v. Clark*, and observed that that case did not govern the one before him; see also *Rhodes v.*

Rudge, 1 Sim. 79, 87; *Mullen v. Bowman*, 1 Coll. 197.

(s) 14 Ves. 193; see also *Dawson v. Clark*, *ubi supra*.

Rights of next
of kin.

Secus, where
executors trust-
ees only for a
specific pur-
pose.

to invest it in the funds in their names, upon the trusts therein-
after mentioned, for the benefit of *Elizabeth*, the daughter of his
late nephew *John Cloke*, for life; and he relied upon his "said
trustees" to apply it for her maintenance; and after her death, he
gave the same to her children; and in case of any dying in her
lifetime, to be *in trust*, for such issue. He then gave to *Sladden*
and *Simmonds*, 600*l.* five *per cents.*, in trust to pay the interest to
his niece *Mary Fox* for life; and, after her death, upon trust, for
his niece *Mary Taylor* for life; and upon other trusts. The
testator then proceeded: "I do hereby direct, that all the above
legacies by me given, shall be paid by my executors, within six
months next after my death, and charge and subject my personal
estate with the payment of the same." He then directed that his
debts, funeral and testamentary expenses, should be paid out of
the residue of his personal estate, adding, "which I have not
herein disposed of; and I do hereby nominate, constitute and
appoint the said *William Sladden* and *Thomas Simmonds*, execu-
tors of this my last will and testament." The testator then pro-
vided that his "said trustees and executors" thereinbefore named,
and the survivor, his executors, &c. should reimburse and in-
demnify themselves, and retain their expenses, and should not
be answerable for losses which should happen to any of the said
trust premises, except from wilful neglect. By a codicil, the
testator gave the residue of his furniture, plate, linen and china,
for the use of his sister, *Elizabeth Simmonds*, for life, and directed
an inventory to be taken by, or by the order of his executors; and
after her death, he gave the same to *William Sladden*, his execu-
tors, &c. to be a vested interest in him on the testator's decease,
subject to *Elizabeth Simmonds'* life interest. The testator died
without issue, and unmarried. The question was, whether the
executors or next of kin were entitled to the residue of the
personal estate. Sir *William Grant*, M. R. decided in favour of
the executors. Against this claim it was urged on behalf of
the next of kin, *first*, that the testator called the executors
trustees; *secondly*, that they were clearly trustees as to part of the
property; and *thirdly*, that he gave directions, which would have
been altogether unnecessary upon the supposition the executors
were to take beneficially. Upon the first, his Honor observed,
"It is true, that, if executors are appointed expressly in trust,
they cannot take beneficially; for the trust is co-extensive with
the office of executor. They take nothing but in trust; and if it
is not declared, for whom they are trustees, the law ascertains,
that the trust is for the next of kin. No case has been cited to

shew, what would be the effect of giving them the appellation of trustees, where they are appointed executors by a distinct clause, without any qualification or restriction whatsoever. But if the testator imposes specific trusts upon his executors, with regard to which they may with strict propriety be called trustees, it would be a very strained construction, that, because he does so call them, he must mean to make them trustees with regard to the whole of the property they take as executors." With respect to the clauses of indemnity, &c. his Honor was of opinion, that the testator's meaning was obvious; and all general charges and expenses were to be borne by the whole estate; which he called "residue;" but that after the separation of the trust funds, each fund should bear the charges and expenses incident to its management. Upon the second point, his Honor continued; "It is said, that part of this property is undoubtedly given to the executors, as trustees; and one of the funds might possibly fall into the residue; as the object of that trust might fail. It is said, the executors being trustees of that fund, they shall not be entitled to it; and then, if there is anything, which might possibly become residue, which they could not take, there can be no part of the residue, which they can take. I know no authority for the first proposition; and if that were true, the second would not flow from it. If the executor, by being appointed a trustee of the whole of the personal estate, is *ab initio* entirely excluded from the residue, he is not the more entitled to anything as residue, because part by lapse or otherwise happens to become residue. But if he is not originally excluded from the residue by being constituted trustee of the whole, what is to prevent his taking anything, that may ultimately form residue; whether originally given to him as trustee for another, or given directly to any other person? If not excluded, he stands as residuary legatee to all intents and purposes; taking every thing, that becomes residue in any way; no matter how given originally. Supposing the law to be otherwise, and that the executor cannot take any specific fund, of which he had been at first appointed trustee, how is he to be prevented from taking that part, of which, by no disposition or intendment of any sort, he had been ever constituted trustee. Upon such a ground, the executor never has been excluded." With respect to the third point, relating to the directions, his Honor thought but little reliance was to be placed upon clauses in a will, which are contended only to be unnecessary. So many unnecessary directions ordinarily find their way into wills, even those, which are not inartificially drawn, that it would be too

Rights of next
of kin.

Secus, where
executors trust-
tees, only for a
specific pur-
pose.

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of kin.

much to infer direct and clear intention from the use of them, in any given case. His Honor then concluded by observing, "There would perhaps have been an argument against them, if by the codicil there had been any bequest to the two, such as there was in *Holford v. Wood* (t). But that does not arise here; for, the new bequest by the codicil being to one only, it was necessary to make it, in order to take the joint interest out of the other. On the whole, not being able to discover any clear intention in the testator to exclude his executors from the beneficial interest in the residue, I must declare, that they are entitled to it."

In *Wood v. Cox* (u), the testatrix devised and bequeathed all her real and personal estate whatsoever to Sir G. M. Cox, his heirs, executors, administrators and assigns, *for his and their own use and benefit*, trusting and wholly confiding in his honor, that he would act in strict conformity with her wishes: and she appointed him and another person executors. On the same day the testatrix executed a testamentary paper, giving several annuities and legacies; and, among others, 100*l.* to the plaintiff, who was her father and sole next of kin; to the testamentary paper were annexed, the words "such is the will of *Sarah Compton*," in the testatrix's handwriting. The question was, whether the residue, subject to the annuities and legacies, was given beneficially to Sir G. M. Cox, or, whether he took it as a trustee for the next of kin. Lord *Langdale*, M. R., after considerable hesitation, decided in favour of the latter; his Lordship forcibly observed, that the testatrix did not use the words, "for his own use and benefit in their ordinary sense; for the subsequent words shewed, that he should not take the whole of it in that sense; that very possibly the testatrix intended Sir G. M. Cox should take the surplus after paying the debts and legacies, but if such were her intention, it was not sufficiently apparent from the expressions used. This judgment was reversed upon appeal by Lord *Cottenham*, C. (v), who was of opinion, that it was not a gift upon trust, but a gift subject to a charge, and that Sir G. M. Cox was entitled beneficially.

In *Mullen v. Bowman* (w), the testator gave the whole of his personal estate (excepting some parts specifically bequeathed) to his cousin and two sisters, upon trust to convert it into money, and apply the proceeds in payment of his debts, funeral and testamentary expenses, but his wearing apparel to be

(t) *Supra*, 4 Ves. 76.

(u) 1 Keen, 317.

(v) 2 Myl. & C. 684.

(w) 1 Coll. 197.

given away to whom they might think fit. He then appointed the same persons executors, and declared that they might reimburse themselves their costs and expenses, occasioned by the due execution of the trusts thereby in them reposed. Sir *K. Bruce*, V. C., held the executors did not take the residue beneficially, referring to *Dawson v. Clarke* (x), and *King v. Denison* (y).

Rights of next
of kin.

5. Another class of cases, where the executors have been excluded, and held trustees for the next of kin, consists of instances, wherein, although the executors have neither been named trustees, nor the residue bequeathed to them upon trust, nor legacies given for their care and trouble, yet there are words expressive of an intention that the executors should only assume their office ministerially, the testator clearly manifesting an impression upon his own mind, that he was imposing only a duty, and not giving a benefit.

5. Where intent expressed to impose on the executors a duty and not a benefit.

Of this, the case of *Androvin v. Poilblanc* (z) is an example. *Henry Poilblanc*, by a *French* will, bequeathed the residue of his personal estate, which he should have either in *France* or *England*, to his only and universal heiresses, *Susan Poilblanc*, his sister for one-third, and *Mary Poilblanc* his sister also for one-third; and in case of her death before him, for her children or descendants by representation in her room or place, for them to dispose of freely at their pleasure, and as effects belonging to them; and as to the remaining third of his effects, he willed that the amount should remain entire in the hands, power, and direction of his elder sister *Susan Poilblanc*, for her to enjoy the profits and interest for life; and after her death, the capital to be inherited by the child or children of his brother *John Poilblanc*, that should be out of the kingdom of *France*, at the death of his sister *Susan*; which said child or children he instituted for his heirs or heir in the property of the said remaining third, and the capital wheresoever it was, to take and dispose of as their own goods. And lastly, in order that his will might be well executed, he named and appointed for executor, *Lewis La Conde*, of *London*, merchant, his friend; giving him in that quality all and as full power and authority as could be given to a testamentary executor. *Susan Poilblanc* having died in the life of the testator, the plaintiffs, who were the testator's sisters and his

(x) *Ubi supra*.

a case within the operation of the

(y) 1 Ves. & Bea. 260; see also

1 Wm. 4, c. 40.

Andrew v. Andrew, 1 Coll. (C.), 686,

(z) 8 Atk. 299.

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next of kin, filed the bill to have so much as was devised to her distributed among them; against which claim the executor insisted that he was entitled to it both in law and equity, in the character of executor. Lord *Hardwicke*, C., decided in favour of the next of kin; observing, "What we call executor and residuary legatee, is in the *Civil* law *universal heir*; and these words, by that law would have entitled the sisters, as being made universal heirs of all his goods and chattels, to have proved the will, if no executor had been appointed, which is the strength of the case, and makes a very plain one for the plaintiffs. It is certain, where an executor is named in a will, and nothing more is said, he is at law entitled, and in this Court, to the residue; but if a legacy is given him, which shows he should not take the whole, as he has a part of the estate, the next of kin of the testator shall be entitled to have it distributed upon the foot of the Statute of Distributions. It is the ground too of all the cases, of excluding the executor, that he is only named for the sake of executing the will, and to have the trouble, and not the benefit. If an executor is considered as a trustee by construction and inference, where a special or general legacy is given, much more where the testator declares him to be a trustee. The case of *Bagwell v. Dry* (z) is expressly in point, and therefore brings it to that question, whether the nominating him executor is not nominating him in trust. It is true, the sisters take it in thirds, but if he had done no more, as has named them universal heirs, they would have been entitled to the probate of the will. For the proper term in the *Civil* law, as to goods, is, *hæres testamentarius*, and "executors" is a barbarous term unknown to that law; therefore a person named as universal heir, in a will, in my opinion, would have a right to go to the Ecclesiastical Court for the probate. Therefore by naming other persons universal heirs, he has divided the authority from the interest, *quoad* the executor. What is the meaning of this? Why, naming him is nothing but as an instrument, and to give him barely the authority of an executor, without any interest, and the facts explain it; for, as the sisters lived abroad, the testator found it necessary to vest the authority in somebody in *England*; for what? Why, merely for the purpose of executing his will here." His Lordship declared, that *Susan Poilblanc* having died in the testator's lifetime, it was a lapsed legacy as to her, and must be divided according to the Statute of Distribu-

(z) *Supra*, p. 1704.

tions, (the executor being only trustee) *per capita*; two-thirds thereof to the plaintiffs, the two children of the testator's sister *Mary Poilblanc*; and the remaining third to the defendant *Susan Poilblanc*, one of the children of *John Poilblanc*, the testator's brother.

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In *De Mazar v. Pybus (a)*, the testator being in *India*, appointed by will two persons at *Copenhagen*, attornies to such will, whom with the house of *Pybus, Call and Grant*, at *New Bond Street, London*, he named guardians of his three children, *St. George, Cecilia, and Eloisa*; and he made those persons, and two others in *India*, whom he appointed attornies there, executors of his will; stating in the conclusion of it, "his situation at a great distance from the *European* colonies, where alone documents of this sort were properly prepared; and in the most solemn manner enjoined *his said executors of that his will, in the fullest sense to carry every part of it into effect*," and particularly to treat the children *committed to their care* with due lenity and attention. The testator died without disposing of his residuary personal estate, which was claimed beneficially by the house of *Pybus & Co.*, in the character of executors; but it was determined, that the testator's next of kin, and not that house as executors, were entitled to the undisposed residue. Lord *Loughborough, C.*, expressed himself to the following effect: "Those who have brought forward this question have totally forgot the last declaration of the testator, stating his situation at a great distance from the *European* colonies, where alone documents of this sort are properly prepared; with an adjuration to the executors to give effect to the will according to his intention. A much better argument may be raised for the other executors than for those in *England*; for no man could be absurd enough to make a *partnership* executors, in order to take the residue. That they are very fit to conduct the office and business of executors, where money is to be collected in one country to be remitted to another, and secured, is very plain. But if the rule holds, that calling a person executor, *ex vi termini*, carries a gift of the residue, the addition that he is to be *attorney* will not take away the effect of the other word; and in speaking of the probability, it is much more probable that the testator should intend persons he knew to take the residue, than the members of a partnership, who at his death might be very different persons from those at the date of his will. They are directed to place the whole pro-

(a) 4 Ves. 644.

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perty out in the funds for the security of the legacies. In the state of ignorance, in which he was, he prescribes to them what they are to do; it is impossible to raise an argument upon it."

In *Urquhart v. King* (a), the testatrix began her will in this manner; "I, *Jane Morris*, of, &c. intending to dispose of part of my personal estate, do make my last will and testament respecting the same in manner following." And, after giving legacies to several persons in *America*, continued thus; "and I direct the said several legacies to be paid to the several persons aforesaid, in lawful money of *Great Britain*, at the expiration of six months next after my decease, and to be remitted them in full without any deduction than for any tax or duty that may be payable in respect of the same legacies to government, or any duty or expense that may be payable or may attend the remittance thereof, or the giving any release or acquittance to my executors for the same; and to that intent I give to my executors hereinafter named, such a sum of money as may be necessary to pay and satisfy every tax, duty and imposition, payable in respect to the same several legacies, and the expense of taking and procuring proper releases and acquittances, and also all costs and charges which they may incur or be put unto, in the execution of this my will: and I constitute and appoint the honourable *Rufus King*, minister and plenipotentiary from the *United States of North America* aforesaid, or such other person, who, at the time of my death, shall be minister plenipotentiary from the *States of America* to this kingdom, and *F. Gregor*, of, &c. executors of this my will." The testatrix having made no disposition of her residuary estate, the question was, whether her next of kin or executors were entitled to it? Sir *William Grant*, M. R., decided in favour of the next of kin; in the course of his judgment observing; "In this case, the circumstances much more strongly indicate the real intention, that the executors should not take beneficially, than a legacy would have done. First, the declaration, that she intends to dispose of *part* of her personal estate, and that it is for that purpose only she makes a will. That amounts to a declaration, that she does not, by appointing an executor, mean to dispose of the *whole*; though that appointment standing alone, would legally have that effect. That declaration of itself might have been not very conclusive, if the whole tenor of the will was not in perfect correspondence with it: but throughout the testatrix proceeds upon the assumption, that

(a) 7 Ves. 225.

nothing is to go to any one but what she specifically disposes of: for directing the tax upon the legacy to be paid, she does not in the usual way direct the executors to pay it, but thinks it necessary to give to her executors such a sum of money as may be necessary to pay all those charges and expenses, and makes no farther disposition. There is no motive for this special bequest to her executors, except that she supposed it necessary to separate from the residue everything which she meant the executors to have. That was nugatory, if she supposed her estate solvent, and the executors were to take the residue; for it would only be taking out of their own residue. The appointment of Mr. King, not in his individual capacity, as a friend, but in his character as minister from the *American States*, or of such other person, who at her death should be minister, is not immaterial, aiding the other circumstances. It is evident, therefore, she meant to confer an office only; and the intention is much more clear, than it would be, from the single circumstance of a trifling legacy to each; which, it is admitted, would be sufficient to exclude the executors. They are, therefore, mere trustees of the residue for the next of kin."

Rights of next of kin.

Where intent expressed to impose on the executors a duty and not a benefit.

In *Sadler v. Turner* (b), *Samuel Turner*, who had for many years been in the *East Indies*, in the capacity of a captain in the *East India Company's* service, and was resident at *Calcutta*, being about to return to *England*, made his will, attested by three witnesses; and professing to dispose of his "temporal estate," he proceeded to give several legacies, amongst which he bequeathed to his dearly esteemed friend, *John White*, of *Calcutta*, and his wife, *M. White*, and to his dear and valued friends, *G. Wroughton*, of *Doncaster*, and his wife *D. Wroughton*, 200*l.* each for a mourning ring; of which trifle, though of small value, he requested their acceptance, as a testimonial not only of the sense he entertained of their attention to his children, but as a token of his personal affection and regard for them. He also gave to *G. N. Thompson*, his diamond ring; and after making provision for the support of his two natural children, and for their mother, out of his property in *India*, he gave the residue of his fortune in *India*, as well as the sum of 6,500*l.* in *England*, in five *per cent.* consolidated annuities, then standing in the joint names of *Warren Hastings* and *William and Thomas Raikes*, in trust for him, to be equally divided between his said two children, payable at twenty-two, with survivorship between them, if either

(b) 8 Ves. 617.

Rights of next
of kin.

Where intent
expressed to
impose on the
executors a
duty and not a
benefit.

died under that age. The testator then appointed *F. Sadler* (whose wife had a legacy to her sole use), *G. N. Thompson* and *G. Wroughton*, his executors in *England*, and requested them to superintend the education of his two children; and he nominated *John White*, of *Calcutta*, and *C. F. Martyn*, of *Calcutta*, his executors in *India*, with a direction to his two last named executors, to remit to *England*, through the Company's treasury, all such property as he might be possessed of at the time of his death, which property was wholly vested in the hands of *John White*, in the government securities of *India*, except such a sum as should produce fifty sicca rupees per month, for the support of the mother of his children. The bill was filed by the executors, to have the rights under the will ascertained, and for the necessary accounts and inquiries, which were directed by a decree. The question arose, who was entitled to the residue; and Sir *William Grant*, M. R., decided in favour of the next of kin; observing, in the course of his judgment, "I do not think the legacies or the mode of giving them, would determine the question between the executors and the next of kin. But there is sufficient, with regard to the two *Indian* executors, to shew, it was to be a mere trust. Can I hold that the three *English* executors take, and the two *Indian* executors are excluded? It is evident from the description of the duty of the latter, that they are meant merely to perform that duty. It amounts to saying, that is the purpose, and the only purpose for which they are appointed. The instant they have done that, they have discharged the whole duty imposed upon them. In *De Mazar v. Pybus* (c), we claimed for the bankers the residue; and it was taken for granted, that if there was a foundation for that claim, all the executors in all the different countries must have been entitled. This is new: but upon the whole, the *Indian* executors cannot claim; and I think it a necessary consequence that the others cannot; for if one is a trustee, all must be trustees."

We may here introduce a case of some ambiguity, (namely) that of *Cranley v. Hale* (d); there the testator, after revoking all wills and codicils, declared that to be his codicil, whereby he directed thus; "that the whole of my property of whatsoever sort or kind, shall pass by this my codicil, according to law, save and except the sum of 3,000*l.* to *Grace Isabella Strode*," &c. The testator excepted other legacies therein mentioned, and then added; "I hereby appoint my brother my sole executor; and

(c) *Supra*, p. 1717.

(d) 14 Ves. 307.

request he will make such little arrangements, as he has reason to think I should wish." After the death of the testator, a bill was filed by the other next of kin, claiming a share in the residue. The question turned upon the construction of the words before stated in the will; whether the testator had in view the legal right of the next of kin, or the legal right of the executor. Sir *William Grant*, M. R., remarking upon the difficulty of construction either way, was of opinion that the construction in favour of the next of kin, was liable to fewest difficulties; and decreed in their favour accordingly. A forcible argument in favour of the construction which prevailed was, that, upon the supposition of an intention that his brother should have the whole (except the legacies), the testator had taken a very circuitous mode of effectuating the purpose, which might have been so easily expressed, and which he might have given him directly; and that if the testator had in contemplation the legal right of the executor, he must have known the mere appointment would have been sufficient, and the previous declaration unnecessary.

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In *Giraud v. Hanbury* (e), the testator appointed the defendant *Hanbury* and another, in conjunction with his (the testator's) wife, executors and executrix of his will, "*hoping they will be so good, out of respect to my wife, to accept the same;*" and then he proceeded thus: "As to what worldly property it has pleased Providence to bestow upon me, I dispose of the same in the following manner; viz." To his wife, his furniture, plate, &c.; to *Hanbury* and his wife, and to the other executor, ten guineas each for mourning, and a ring of the value of two guineas. The testator then gave to his wife the interest, during her life, of all sums he had or might have at his decease in the Bank, or elsewhere: and, after some other pecuniary legacies, gave to *Samson* and his wife, after the death of his (testator's) widow, the interest of 1,000*l.* five *per cents.* during their lives; and after their deaths, the principal between their two daughters, the plaintiffs: but he made no disposition of the residue. Sir *William Grant* decided, that the executors were intended to take the office only, and not the beneficial interest. His Honor observed: "The words used by this testator, in appointing his executors, are strongly indicative of an intention to impose a burthen, not to confer a benefit upon them. If they were to take beneficially after the wife's death, they would have had a sufficiently strong inducement to accept the trust, and to manage the estate to the best

(e) 3 Meriv. 150.

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Where intent
expressed to
impose on the
executors a
duty and not a
benefit.

advantage: the more they served her in the first instance, the more they would eventually serve themselves. But the testator seems to conceive, that he is appointing them to an office, which, but for their respect to his wife, they might possibly decline. It is from that motive only, that he hopes their acceptance." And after citing the case of *Lord North v. Purdon* (f), his Honor added, "In this case the testator declares, in the clause immediately following the appointment of his executors, that he means to dispose of the whole of his property; and then, can it be supposed, that he would have expressed a *hope* that they would consent to accept the bulk of his property, and have the kindness to take care of it till it becomes their own? The intention is plain, to dispose of the whole. He does not fully execute that intention, but still this shows that he meant the whole to be the subject of subsequent disposition, and did not conceive that, by the appointment of executors, he had already disposed of it."

In *Lord North v. Purdon* (cited in the last case), the expression used by the testatrix was, "*that she heartily requested, the defendants, 'to take upon them the execution of the will.'*" But the case did not depend altogether upon that clause; there having been a bequest over of the residue, with a blank for the name of the person to take (g). Sir John Strange, after observing upon that inchoate clause, adds, that "when the testatrix mentions her executors by name, and only as such, in the following sentence, she plainly intended them no farther favour: and there are added pathetic supplicatory words addressed to her executors, to take on them the execution and burthen of her will; which words she could not be supposed to have used, had she intended them so great a benefit as the residue."

We close the present class of cases with that of *Braddon v. Farrand* (h): there the testatrix began her will thus; "I constitute and appoint *Robert Farrand* my executor, to see that my will is put in force." She then gave legacies to various persons, but made no disposition of the residue. Sir John Leach, M. R., held the executor a trustee for the next of kin, upon the ground that the testatrix, by the above words, expressed an intention to confer an office and not a beneficial interest.

6. Where the
whole residue
originally given
away, and the
whole or part
lapses.

6. When the residue was originally and effectually given away from the executors, but the whole or some part of it, by subse-

(f) 2 Ves. sen. 494.

(g) Per Sir William Grant, 3 Mer.

152; reported, 2 Ves. sen. 495.

(h) 4 Russ. 87.

quent events, became undisposed of, such disposition in the first instance from the executors has been held a sufficient manifestation of intention in the testator to exclude them from taking any part of such residue beneficially; and they have accordingly been held trustees thereof for the next of kin.

Rights of next of kin.

Where the whole residue originally given away, and the whole or part lapses.

Thus, in *Bennet v. Batchelor* (i), *Francis Hamlin*, after devising his real estate, gave a legacy to a goddaughter, and then to *Jane Powell* all his household goods, books, bookcase, linen, wearing apparel, and all other unbequeathed goods and chattels, that should be in his possession at the time of his death, except the legacies he had given or should give. He then gave her all money due to him, that she might discharge the demands upon him; and then bequeathed to other persons certain articles of plate and furniture, and some pecuniary legacies. Then came a clause, charging the said *Jane Powell* with the payment of his debts, legacies, and funeral expenses. He appointed *Jane Powell* (a legatee of 10*l.* for mourning), and two other persons (to whom no legacies were given), joint executors of his will. *Jane Powell* died in the testator's lifetime. The bill was filed by the personal representative of *John Bennet*, the sole next of kin of the testator, for the residue against the surviving executors. The executors insisted that the bequests to *Jane Powell* were specific, not residuary; but if residuary, there was nothing to turn them into trustees. But Lord, *Thurlow*, C., decided in favour of the next of kin; expressing himself to have no doubt upon the question, though, had it been recent, he might have felt difficulty in the original argument; adding, "But after so many cases upon the subject, and the law has been so well settled, I am under a difficulty to take any line of argument, unless that which appears to have been suggested by Sir *Joseph Jekyll* in that short note in *Strange* (j). He there seemed to go upon a difference between a lapse, and what is not disposed of. In case of construing intention, it may have place, but not otherwise; for a lapsed legacy is a case to which the will does not apply. At law, executors take absolutely any beneficial as well as any nominal interest, where there is nothing serving as an intimation of an idea, that the testator was not making a beneficial office, but merely a trustee. But when he has taken from them in the same instant all that would result beneficially to them, it is

(i) 1 Ves. jun. 63; 3 Bro. C. C. 28, S. C.

(j) *Man v. Man*. 2 Stra. 905, *infra*, p. 1732.

Rights of next
of kin.

Where the
whole residue
originally given
away, and the
whole or part
lapses.

difficult to say he meant they should take any thing more than a trust (*k*).

The rule was equally applicable where *part* of the residue was originally given, but the testator erased (*l*) the name of the legatee, and omits to substitute another. In such case, the next of kin will be entitled to that part undisposed of.

In *Leake v. Robinson* (*m*), Sir *William Grant* expresses himself thus: "I have always understood, that, with regard to personal estate, every thing which is ill given by the will does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, *unless some part of the residue itself be ill given.*"

In accordance with the concluding part of this *dictum*, Sir *Thomas Plumer*, M. R., decided the case of *Skrymsher v. Northcote* (*n*). There *Simeon Coley* bequeathed the residue of his personal estate to trustees, and directed them, in events which happened, to transfer 500*l.* five *per cent.* Bank annuities, part of such residue, unto his daughter "*Hannah Northcote*, wife of *Thomas Northcote*, of *Piety-street*," &c. The testator bequeathed the other parts of the residue to other legatees, and appointed executors. The testator had drawn a pen through the name and description before given of his daughter *H. Northcote*; and in a subsequent codicil, the testator added these words, "I rased the name of *Northcote* out of my will with my own hand." The question was, who was entitled to the 500*l.* five *per cent.* Bank annuities? Sir *Thomas Plumer* decided in favour of the next of kin; observing, "The question is, whether the rule applicable to residue is different from that which prevails in the case of every other legacy. It seems clear on the authorities, that a part of the residue of which the disposition fails will not accrue in augmentation of the remaining parts, as a residue of residue; but, instead of resuming the nature of residue, devolves as undisposed of. Residue means, all of which no effectual disposition is made by the will, other than the residuary clause; but when the disposition of the residue itself fails, to the extent to which it fails, the will is inoperative. In the instance of a

(*k*) See also *Dawson v. Clark*, *supra*; 18 Ves. 254, 255; see the cases cited, Chap. VIII. sect. iv. div. 2, p. 485, &c., and sect. vi. div. 2, p. 498, and the cases there cited; also *Pile v. Salter*, 5 Sim. 411.

(*l*) With regard to erasure or

alteration of wills made upon or after the first of *January*, 1838; see 1 Vict. c. 26, s. 21.

(*m*) 2 Mer. 393.

(*n*) 1 Swan. 566; see also *Lloyd v. Lloyd*, 4 Beav. 231; *Green v. Pertwee*, 5 Hare, 249.

residue given in moieties, to hold that one moiety lapsing should accrue to the other, would be to hold, that a gift of a moiety of the residue shall eventually carry the whole. Whatever argument applies to the entirety of the moiety, applies to every part of it; the distinction is mere division:" and his Honor decided, that as to the 500*l.* the testator died intestate.

Rights of next
of kin.

Where the
whole residue
originally given
away, and the
whole or part
lapses.

An apparent exception out of a residuary bequest may, however, amount to no more than an ordinary bequest of the excepted property; and so, by lapse falling into the residue, pass to the residuary legatee.

Thus, in *Evans v. Jones* (o), the testator bequeathed all his personal estate (except the money laid out in stock, mortgages, bonds, notes, and book-debts), to *A.*; and as to his money laid out in stock, mortgages, bonds, notes, and book debts, he gave the same to *B.* The gift to *B.* failed by an event analogous to lapse, and Sir *K. Bruce*, V. C., being of opinion that the expression of exception meant no more than saying that the testator intended to make certain bequests afterwards made by him, held that the property intended to be given to *B.* passed under the residuary bequest to *A.* (p).

It may also happen that upon the intention to be collected from the testamentary instruments, the share of a residuary legatee, which is revoked, may devolve upon the other residuary legatees, and not to the next of kin, although the residue is not given to them as a class.

In *Harris v. Davis* (q), the testator, by will, made since the 1 Vict. c. 26, bequeathed the residue of his personal estate in equal shares to *L.*, *M.*, *N.*, *O.*, and *P.* In a subsequent part of his will he bequeathed to *H.* one-half of the legacy named to each of the other legatees, (that is to say) one-half what his brother, *M.*, ought to receive. By codicil the testator revoked "all that part written in my former will, which leaves a legacy to *H.*, written in my will on the thirty-second and thirty-third lines." Sir *K. Bruce*, V. C., held that by this revocation the will was to be read as if the gift to *H.* was not in it; consequently, that the revocation enured to the benefit of the other legatees. His Honor seems to have arrived at this conclusion upon the intention apparent from the will and codicil, and expressly recognises the authority of *Creswell v. Cheslyn* (r).

But we may here notice a distinction with regard to the

(o) 2 Coll. (C.), 516.

(p) See also *Wingfield v. Newton*,

Ib. 520, note.

(q) 1 Ib. 416.

(r) 2 Eden, 123.

Rights of next
of kin.

Where the
whole residue
originally given
away, and the
whole or part
lapses.

Secus; Where
specific or ge-
neral legacies
lapse, *sed qu.*

executor's right to the residue undisposed of, between the lapse of a portion of the *residue* originally bequeathed, and the lapse of a specific or general legacy. It is admitted that the cases of *Bennet v. Batchelor*, *Skrymsher v. Northcote*, and the *dictum* in *Leake v. Robinson* (*s*) clearly establish the proposition, that the executor, in that character, was not entitled beneficially to any portion of the *residue* originally bequeathed, but which lapsed by the death of the legatee in the testator's lifetime, or by the disposition otherwise becoming ineffectual; but that, with respect to a *specific* or *general legacy*, it was urged, the law was otherwise; for (with the exception just admitted), the executor was by law, as also according to the equity of the Court of Chancery, in all respects in the situation of the residuary legatee, and, as such, entitled to whatever might eventually become undisposed of. For this the case of *Wilson v. Ivat* (*t*) is deemed an express authority, which decided that a specific legacy lapsing formed part of the residue, and so belonged to the executrix, who is incorrectly stated in the report to be residuary legatee. The observations of Lord *Thurlow* in *Bennet v. Batchelor*, and of Lord *Hardwicke* in *Jackson v. Kelly* (*u*), have been also considered to support the distinction in favour of the executor. In addition to the above, *Turner v. Ogden*, as cited by Sir *William Grant* in *Pickering v. Stamford* (*v*), and explained by him in *Dawson v. Clark* (*w*), is a further authority. The same learned Judge recognises the same distinction in *Leake v. Robinson*, in *Pratt v. Sladden* (*x*), in *Dawson v. Clark* (*y*), and in *Southouse v. Bate* (*z*); and the expression of Sir *Thomas Plumer* in *Skrymsher v. Northcote* seems to infer that the executors would take in all cases of lapse, except that of the residue. In opposition to these authorities there is the *dictum* of Lord *Eldon*, in *Dawson v. Clark* (*a*), upon appeal from the Rolls, where he addresses himself to the observations of Sir *William Grant* in the same case when before him, and which we have before (*b*) cited. In *Southouse v. Bate*, Sir *William Grant*, adverting to Lord *Eldon*'s remarks in *Dawson v. Clark*, says, "I do not know whether, upon the appeal, the Lord Chancellor meant absolutely to overrule that opinion; but from the note with which I have been furnished, it is clear that he did not concur in it. Had

(*s*) *Ubi supra*.

(*t*) 2 Ves. sen. 166, and the decree in *Bell's Supp.* 335, and *infra*.

(*u*) 2 Ves. sen. 285.

(*v*) 3 Ves. 333.

(*w*) 15 Ves. 417.

(*x*) 14 Ves. 193, 200.

(*y*) 15 Ib. 417.

(*z*) 2 Ves. & Bea. 396.

(*a*) 18 Ves. 254, 255.

(*b*) *Supra*, p. 1707, *et seq.*

I been aware that it would have been thought liable to so much doubt, I should have stated more fully the reasons upon which I thought, and *still think*, that the executors, as such, would have been entitled, even if it had been decided that they did not take by the direct bequest."

Rights of next of kin.

Where the whole residue originally given away, and the whole or part lapses.

Qn. Where specific or general legacies lapse.

The argument against the executors taking a lapsed, *specific*, or *general legacy*, is founded upon the same principle as that which has prevailed against them in the excepted case of a portion of the residue lapsing, namely, upon the clear inference of intention that the testator meant it to go from them. It is urged against the executor, that the law casts the residue upon him only in the absence of any intention manifested by the testator to give it otherwise; that the executor is not entitled, according to the *dictum* of Sir *William Grant*, to whatever *ultimately becomes undisposed of*, but, as Lord *Eldon* states the rule (c), to what the testator *does not mean to dispose of*. If the latter proposition be law, it is certainly difficult to reconcile the executors taking a lapsed, specific, or general legacy, consistently with the testator's intention clearly manifested, that to the value of the specific chattel or general legacy so bequeathed, the testator, at the time of making his will, clearly expressed his intention to give the surplus away from the executor. The *quantum*, if not the weight of the authority, however, it must be admitted, is in favour of the executor's right being the same as that of the residuary legatee, with the exception above alluded to; but until the point is again brought before the Court, it must be considered doubtful.

The question above discussed is precluded in wills of persons dying after the 1st *September*, 1830, by the statute of 1 *Wm.* 4, c. 40.

7. We proceed to another class of cases in favour of the next of kin, namely, those wherein the residue was disposed of by an *imperfect* bequest; and wherein the attempt to dispose of it has been considered a sufficient manifestation of intention to exclude the executors, who will be trustees for the next of kin: and it is immaterial whether the bequest be imperfect through the testator's leaving a blank for the name of the legatee, or by declaring an intention to dispose of the residue by a codicil, which he never makes, or by other omissions of a similar description, so that it be clear the testator's intention was to dispose of the *whole* of the residue.

7. Where residue is attempted to be disposed of by an imperfect instrument.

Rights of next
of kin.

Where residue
is attempted to
be given by an
imperfect in-
strument.

In the Bishop of *Cloyne v. Young* (d), *G. Berkeley* made the defendants *Young* and *Broom* his whole and sole executors; and as to the personal estate, with which it had pleased God to bless him, he disposed of it as follows, &c.: Among other legacies, he gave *William Broom* a mortgage he had upon *Broom's* estate, with all the interest due thereon, to be equally divided between the daughters and niece of *Broom*; and upon their deaths, to the sons of *Broom*. To *Young* he gave a bond of 200*L.*, owing to the testator by *Broom*. Then followed this clause: “*Item*, after all my just debts and legacies paid, I give and bequeath the remainder of my estate, real and personal, and whatever shall be due to me for half-pay, &c.,” without saying more. The next of kin claimed the residue, upon the ground the executors were trustees for them; and Lord *Hardwicke*, C., decided accordingly.

His Lordship expressed his opinion, that the mere circumstance of the executors having legacies would not, standing alone, in that case be sufficient to exclude them; the legacy to *Broom* not being for himself, he not being entitled even to the interest for his life, and the legacy to the other executor would not exclude both. His Lordship was also of opinion, that the great stress of the case rested upon the imperfect residuary clause, and that it was sufficient to exclude the executors. His Lordship, in the course of his judgment, made the following observations: “By the last clause he has shewn an intent by express words to dispose of the residue; then he did not mean they should take it by implication, by force of having the office. But it is said, this being an imperfect clause does not operate, and nothing is to be inferred from thence; and, therefore, the testator might mean to give it to the executors, or might be in doubt to whom to give it, and not having cleared up that doubt, the right of the executors is to arise. Admitting he intended to give it to the executors, it follows he did not intend they should take it as executors, but by express words; and this being in doubt, proves the same point still, that it was not his intent at the time of making his will, that they should take this residue by force of being executors, but intended a farther disposition, which he has not made. Then is not this the strongest case to say, that it was not the intent that by being named executors, they should have the beneficial interest:” and again, “An heir takes by the law, not by the intent of the testator, but contrary to his intent

(d) 2 Ves. sen. 91; see also *Davers v. Dewes*, *supra*, p. 1679.

and will; whereas an executor must take by the will, and therefore if, at the making of the will, the intent appears that the executor should not take the beneficial interest in the surplus, no accident afterward can give it him, whereas an heir has another foundation from the law. This residuary clause shews an intent to dispose of it in some other manner, though imperfect, so that it cannot go to the executor, as that would be contrary to the intent; and in that respect, it is something like *Nevill v. Parker*, where the will was left unfinished, 'I give to *A. B.*' without saying what he gave; but it came in the place where the residuary bequest was to be expected. It was said, indeed, there was a legacy. I remember that case, and think Lord *King* did lay weight on that argument. But in the present case, the residue must be accounted for, and divided among the plaintiffs as the next of kin (*e*)."

Rights of next of kin.

Where residue is attempted to be given by an imperfect instrument.

In *Mordaunt v. Hussey* (*f*), the testatrix appointed the defendant *Hussey* executor of her will, and gave him a legacy. Afterwards, by a testamentary paper, which was proved in the Ecclesiastical Court, the testatrix directed the residue of her personal estate to be disposed of, according to private instructions to her executor *Hussey*. By a codicil, she appointed the defendant *Dennet* to be one of her executors, who claimed, on behalf of himself and co-executor, the residue, no instructions having been given by the testatrix to *Hussey* with respect to it. Lord *Loughborough*, C., observed, "This instrument is proved as a testamentary paper. Upon the whole disposition the testatrix has made, she has reserved an ulterior disposition of the residue. That ulterior disposition being either not made, or not known to be made, of course the executors can claim nothing."

In *Oldham v. Carleton* (*g*), the testator, after bequeathing the interest of a certain sum in the four *per cents.* stock, and of a sum to be invested in the same stock, to his wife for life, with a power to her to dispose of one-third part after his death, with his plate, linen, &c., as to the rest, residue and remainder of his estate, after payment of the said bequest to his wife, viz., two-thirds of the property he should die possessed of, he gave the same as follows: "First, to the children of *William Carroll*, 60*l.* of the four *per cents.* consolidated *Bank annuities*. Also, to the eldest of such children, 30*l.* *per annum* for life, and to his lawful heir,

(*e*) See Lord *Eldon*'s remarks *Sheer*, Mos. 288, 301, *supra*, 1705.
upon this case, 19 Ves. 650.

(*g*) 2 Cox, 399.

(*f*) 4 Ves. 117; see *Wheeler v.*

Rights of next
of kin.

Where residue
is attempted to
be given by an
imperfect in-
strument.

payable out of the interest, &c." He then made a similar bequest in favour of the children of *Thomas Stoakes*; and he appointed his said wife and *John Oldham* executors of his will: and he declared his intention, "that if the residue of his said property, after payment of the children of *Thomas Stoakes*, was not sufficient to pay the specified annuities of 30*l.*, the residue should be equally divided, as above specified." The residue of the testator's personal estate was considerable after payment of debts and legacies. The question was, who were entitled to it? For the next of kin, and executors of the widow, it was insisted, that there was in the will fully enough to shew, that the testator intended to give his executors *the office* only, and not any beneficial interest in his personal estate, beyond the legacies expressly given them; that it was sufficient for this purpose, to find in the will an intention to dispose of the whole of the personal estate, whether the testator carried such intention into effect or not; the Bishop of *Cloyne v. Young*, and *Wheeler v. Sheer* (*h*), were cited; and Lord *Alvanley*, M. R., decided in favour of the widow and next of kin. Another point decided was, that by the words of the bequests of the 60*l.* four *per cent.* Bank annuities to the children of *William Carroll* and *Thomas Stoakes*, legacies of *principal* were given, and not 60*l.* *per annum*, though his Lordship's impression was, the testator meant the latter (*i*).

Secus, where
the intention to
dispose of the
residue is un-
certain.

If, however, it were uncertain whether the testator did or did not intend to dispose of the residue from the words used by him, it followed necessarily that such uncertainty would preserve the legal rights of the executors, and of which the following case of *Rawlings v. Jennings* (*j*) is an instance.

There the testator bequeathed to his wife, *Alice Jennings*, an annuity of 200*l.*, part of money he then had in Bank security, entirely for her own use and disposal; adding, "together with all my household furniture and effects of what nature or kind soever that I may be possessed of at the time of my decease." The testator gave the interests of the other stock to his son *M. J. Jennings* for life, and if he should die without issue, then to his widow, if living at his decease, the sum of 500*l.*, adding, "and the remaining part to return to my family." The testator appointed his wife, *Charles Danvers*, and *M. J. Jennings*, executrix and executors. *Danvers* renounced. One of the questions was, who was entitled to the residue? Sir *William Grant* being

(*h*) *Supra*.

(*i*) See 15 Ves. 414, per Sir Wil-

liam Grant.

(*j*) 13 Ves. 39, *supra*, p. 280.

of opinion that the word "effects" would not include the residue, but must be confined to articles *ejusdem generis* with those specified in the preceding part of the sentence, decided in favour of the executors, observing, that their legacies being unequal they were not on that account excluded, but were entitled in their legal right as executors, unless there was something in the will to raise a trust (*k*). That by the words "remaining part to return to my family," it was not easy to say what the testator meant; but, supposing he meant next of kin, it related only to the stock given to his son, and did not shew any intention with reference to any part of his property except that specific residue.

Rights of next of kin.

Secus, where the intention to dispose of the residue is uncertain.

8. Where the residue was expressly given to the executor *for life*, the gift excluded him from taking, in that character, any part of it absolutely, and for this reason, that such restricted gift implied a negative (namely), that the executor should not have the surplus for a longer period.

8. Where the residue is given to executor for life.

This rule was stated by Lord *Hardwicke*, in *Newstead v. Johnson* (*l*), but it does not rest upon *dictum* merely; it is well established by the following cases.

In *Joslin v. Brewett* (*m*), the testator bequeathed the residue of his personal estate to his wife during her life. Upon the death of the widow, the next of kin of the husband claimed the residue, which was decreed accordingly.

So in *Gobsall v. Sounden* (*n*), the testator bequeathed to his wife the income and profits of all his real and personal estate for her life, and appointed her executrix, but made no disposition of the residue after her death; and upon the question, who was entitled to it, it was decreed that the executrix was a trustee for the next of kin; and the Court observed, that, if the limitation for life did not confine it to that time, it was of no effect at all, and decreed the residue to be distributed after the wife's death, namely, one-third to her, another to the testator's daughter, and the third to the children of a deceased daughter.

Again, in *Willis v. Brady* (*o*), where the testatrix bequeathed the residue of her personal estate to *Francis Sall* and *Judith* his wife for her life: and after her death, the testatrix bequeathed one moiety of her residue to three other persons, and appointed

(*k*) See *Griffiths v. Hamilton*, 12 Ves. 298.

(*l*) 2 Atk. 45, *infra*.

(*m*) Bunb. 112.

(*n*) 2 Eq. Ca. Abr. 444; see also

Turner v. Ogden, cited by Sir William Grant, in *Dawson v. Clark*, 15 Ves. 417.

(*o*) Barn. Rep. 64.

Rights of next
of kin.

Where the re-
sidue is given
to executor for
life.

Francis Sall and his wife executors. It was held, that the gift of one moiety for life excluded them, as executors, from taking the other moiety, which was decreed to belong to the testatrix's next of kin.

The same point was decided in *Dicks v. Lambert* (c), where the testator bequeathed various particulars comprising all his personal estate to his wife for life: and, after specifically disposing of, and charging with legacies, certain parts after her death, he appointed her executrix; and Lord *Alvanley*, M. R., decided, that that being a gift of part, the wife (as executrix) could not take the residue absolutely.

9. Where the
residue given
to the execu-
tors as tenants
in common, and
a part lapses.

9. We proceed to another class of cases, wherein the executors have been excluded in favour of the next of kin, and that upon the principle of the preceding cases.

Where the residue is expressly given to the executors *as tenants in common*, and by the death of one or more of them the share or shares of the executors so dying become lapsed, the surviving executors will not, in that character, be entitled to such lapsed shares, but they will belong to the testator's next of kin; because it is to be presumed that the testator, by giving the executors his residuary estate in divided shares, intended to give them those shares, and no more (d).

In *Man v. Man* (e), *Sampson Man* bequeathed the use of his personal estate to the defendant and his wife for life, if she so long continued his widow; and after her death to *A.*, *B.*, *C.* and *D.*, his brothers and sisters, share and share alike. *C.* and *D.* died in the lifetime of the testator. *A.* and *B.* the surviving legatees filed their bill against the executrix, suggesting waste made by her of the estate, &c. for an account, and to have the residue secured, &c.; upon which, the widow insisted, that the shares of *C.* and *D.* belonged to her, as lapsed legacies. Sir *Joseph Jekyll* is reported to have given the following judgment: "The Statute of Distributions only takes effect when the testator omits to make a disposition of an interest vested in him; as if he devises part of his estate, and takes no notice of the other part in his will; he dies intestate, *quoad* that part not devised, and then the next of kin claim under the statute, and they shall have it: but, when an interest has been once disposed of, and the party who would have taken it, had he survived the testator, dying in

(c) 4 Ves. 725, *infra*.

(d) See *Bagwell v. Dry*, *supra*,

p. 1704; see also p. 485.

(e) 2 Stra. 905.

his lifetime, and the testator not making any other disposition of the share he would have had, in case he had survived the testator, nor any declaration showing a design of altering his will; it is plain the testator, as he knew of the death of the legatees, did design (if he knew anything of the law), that the executrix his widow should have the shares of the deceased legatees. And the survivors could not well take the shares, because the testator had particularly appointed that each of his legatees should have a special share." And he decreed the wife should have the two shares absolutely to herself; and the use and interest of the other half for her life.

Rights of next of kin.

Where the residue given to the executors as tenants in common, and a part lapses.

This case has been very shortly reported by Sir *John Strange*, and seems an authority for no other point than the non-surviving of lapsed shares. With respect to the distinction taken between a lapse and where property has not been disposed of; Lord *Thurlow*, in *Bennett v. Batchelor* (*f*), observed, that the only difference that circumstance could make, was in construing the intention. And how the executrix could take the two lapsed shares of the residue absolutely, in consistency with her express estate for life in the whole, does not appear; so that it is reasonable to suppose with the Lord Chancellor, in *Kennedy v. Stainsby* (*g*), in support of the decree, that it was made upon circumstances not now appearing.

In *Page v. Page* (*h*), the testator bequeathed the residue of his personal estate to six persons, *to each of them a sixth part*, and made them executors. One of the executors and residuary legatees died in the life of the testator. Lord *King*, C., decided, that it was a lapsed legacy as to one-sixth, and undisposed of by the will; the residuary legatees being *tenants in common*, and not joint tenants; and therefore the legacy should not survive, but go to the testator's next of kin, according to the Statute of Distribution."

Again, in *Painter v. Salisbury* (*i*), the testator gave the residue to his wife and son equally, and appointed the wife executrix. The son dying before the testator, his moiety in the residue was decreed to the testator's next of kin, and not to the executrix; and Lord *Hardwicke* said (*k*), "that the ground of this decision was, that the testator had declared his intention to make a

(*f*) *Supra*, p. 1723; 1 Ves. jun. 67.

(*i*) Cited in *Bennet v. Batchelor*, 1 Ves. jun. 67.

(*g*) *Supra*, p. 1692; 1 Ves. jun. 66.

(*k*) In the *Bishop of Cloyne v. Young*, 2 Ves. sen. 91, *supra*.

(*h*) 2 P. Wms. 489.

Rights of next of kin.

Where the residue given to the executors as tenants in common, and a part lapses, or as a class.

Socus, where the executors take as joint-tenants, or as a class.

different disposition of the surplus of his personal estate; which different disposition I understand to be between the wife and son in equal shares."

So in *Peat v. Chapman* (*l*), the testator directed by his will, that his residuary estate should be divided between two persons: and Sir *John Strange*, M. R., observed; "This must be understood to be *equally* divided; and by the death of one in the life of the testator, his moiety should not survive to the other devisee of the residue, but be considered undisposed of by the will, and divided among the testator's next of kin."

The rule was the same where the residue was given to executors as individuals, and with words of severance (*m*).

But this reasoning did not apply when the shares, which the residuary legatees were to have, were not distinctly ascertained. If, therefore, the executors took the residue as joint-tenants, or in their representative, and not in their individual character they took as a *class*, and the shares of those dying in the life of the testator would not be distributable among the next of kin, but would belong to the surviving executors (*n*). The same rule still applies where the bequest is to the executors in their representative character as a class, notwithstanding words of severance (*o*).

In *Frewen v. Relfe* (*p*), the testatrix, after making several bequests to the persons named, among whom were Mrs. *Frewen*, Mrs. *Berry* and *Benge*, three of the executors, declared, that if any of her legatees should die in her life or before their legacies became payable, the same should go and descend equally between her executrixes; and she appointed Mrs. *Frewen*, Mrs. *Berry*, and Mrs. *Barry* executrixes. The testatrix at different times added several codicils, by one of which she revoked the appointment of Mrs. *Barry*, and appointed Mrs. *Lucy Relfe*, and *W. H. Benge* her executors, in the room, place and stead, with the same power, authority and share of her estate as the said Mrs. *Barry* would have had by virtue of her said will, with the other executors, in every respect whatsoever. By another codicil the testatrix, after reciting that she had appointed *Elizabeth Barry* executrix, revoked the appointment and named *Mary Barham* in her place. By another codicil she appointed her friend and

(*l*) 1 Ves. sen. 542.

(*m*) *Page v. Page*, 2 P. Wms. 489; *Owen v. Owen*, 1 Atk. 494, *supra*, p. 1369; see also *Barber v. Barber*, 3 Myl. & C. 693.

(*n*) See also Chap. VIII. sect. iv., Vol. I. p. 484.

(*o*) *Barber v. Barber*, *ubi supra*.

(*p*) 2 Bro. C. C. 220.

cousin *Catherine Berry* one of her executrixes in the room and place of her late mother *Mary Berry* deceased, and gave her the same in every respect whatsoever as her mother would have had and received at her death by her said will. *Mary Berry* and *Mary Barham* died in the life of the testatrix, and the will was proved by the surviving executrixes. The bill was filed by the plaintiffs against *Lucy Relfe* and *Benge*, insisting that the testatrix having appointed the plaintiff *Philadelphia Frewen* and *E. Barry*, and *M. Berry* executrixes, and having by the codicil substituted the defendants to be executors in the place of *E. Barry*, and *C. Berry* in the room of *M. Berry*, it appeared to have been the testatrix's intention, that the plaintiffs *Philadelphia Frewen* and *C. Berry* should each be entitled to one-third of the residue, and the defendants to one-third only; but the defendants claimed fourth parts each of the residue by their answers. *Lucy Relfe* died, having by her will appointed *M. Crippes* sole executrix, who was made a defendant in the suit. The questions were, first, whether all the executors were entitled equally, or the defendants were entitled only to the share of *E. Barry* between them? Secondly, whether *Lucy Relfe*'s share survived to *Benge*, or the other executors, or the defendant *Crippes* as her representative was entitled to it? Lord *Thurlow*, C., said, "Is there any case which has carried tenancy in common so far as to give a residue to executors as tenants in common, and not in the manner in which they usually take: and if, in fact, they were joint-tenants, could their having joined in an answer that it was a tenancy in common, have the operation of a severance? A note certainly would do it, because the joint-tenancy may be severed by any contract; and if they said in their answer, that they agreed so to do, I should construe them to have done a sufficient act to sever. The first clause in the will is certainly not sufficient to make the executors tenants in common; I never knew any construction carried so far. In giving the lapsed legacies, the testatrix has used the word 'equally.' Certainly the word 'equally,' has been held to give a tenancy in common, but that is always in reference to the other parts of the gift. The general intent of the testator will overrule the word 'equally,' rather than the word 'equally' shall overrule the general intent of the testator (o). From the whole of the words, I think she meant them all to be executors, with equal authority and equal shares, and that, they being now reduced to three, those three must take.

Rights of next
of kin.

Where the re-
sidue given to
the executors
as joint-
tenants.

(o) *Armstrong v. Eldridge*, 3 Bro. C. C. 215, *supra*, p. 1396.

Rights of next
of kin.

Where the re-
sidue given to
the executors
as joint-
tenants.

in equal shares. There is no real suggestion of any act done by Mrs. *Relfe* to sever the joint-tenancy."

Again, in *Knight v. Gould* (o), the testatrix gave the residue of her personal estate unto her executors, thereafter named, to enable them to pay her debts, legacies, and testamentary charges, "and also to recompense them for their trouble equally between them." She then appointed three persons her executors, one of whom died in her lifetime, and the question was, whether the share bequeathed to him passed to the two surviving executors or lapsed for the benefit of the next of kin. Lord *Brougham*, C., on appeal confirming the decision of Sir *L. Shadwell*, V. C., decided that the executors took as a class and consequently that the survivors were entitled to the whole.

In *Griffiths v. Hamilton* (p), all the executors died except two, *Hoare* and *Griffiths*; *Hoare* alone proved, and died: after his death *Griffiths* proved: he was declared entitled, as surviving executor to all the testator's personal estate, not reduced into possession and divided before the death of *Hoare*.

Again, in *White v. Williams* (q), the testator gave unequal legacies to his executors *Mary Moxon* (his wife), *J. W. Wild* and *Joseph Faint*, but made no disposition of his residue; leaving the conclusion of his will imperfect by a blank, between the writing and the signature. Two of the executors died. A fund standing in the name of the testator was claimed by the surviving executor, as belonging to him in that character beneficially. Sir *William Grant*, M. R., distinguished the principal case from *Knewell v. Gardiner* (r), and was of opinion, that to exclude the executors from their legal right, he must be satisfied that the blank was left for the purpose of introducing a residuary clause, which he thought would be a strong inference to draw from the circumstance of a blank between the writing and the signature; and which was not enough to exclude the executor. And his Honor decided, that the fund must be considered as part of the estate unadministered, not reduced into the possession of any of the executors; and consequently, that it survived to the surviving executor.

10. Where one
executor trus-
tec, all so.

10. We may here remind the reader, that where one executor

(o) 2 Myl. & K. 295.

(q) 3 Ves. & Bea. 72, also Coop.

(p) 12 Ves. 298, *infra*. See also 58.

Baldwyn v. Johnson, 3 Bro. C. C. 455.

(r) Gilb. 184, *supra*.

is considered a trustee for the next of kin, all are so; as will appear by the cases referred to in the note (s).

Rights of next of kin.

Where the executors are trustees by the express words of the will, or by the construction of the Court of Chancery, an estate *pour autre vie* originally granted to a man, his executors and administrators, and which is not disposed of specifically by the will, devolves upon the executors as special occupants, not in their own right beneficially, but as trustees for those who are entitled to the general residue of the testator's personal estate; that is, if the residue be disposed of, for the residuary legatee; but if not, then for the testator's next of kin.

Where one executor trustee, all so.

Notwithstanding the property be an estate *pour autre vie*, and they take as special occupants.

This point was doubtful previously to the decision of the well known case of *Ripley v. Waterworth* (t). The statute of 14 Geo. 2, c. 20, s. 9, provides only for the distribution of estates *pour autre vie*, in case there was no special occupant; so that where there was a special occupant, as in the case of a grant *pour autre vie* to a man, his executors, &c. a doubt arose, who was entitled after debts paid; whether, in fact, the executor would not, as such special occupant, take it for his own benefit. But that point is now settled by the case alluded to, and to which we refer the reader, who will find Lord *Eldon's* learned and elaborate judgment well deserving his careful perusal.

For the rights of the testator's next of kin to the net surplus arising from the sale of real estate, the reader is referred to Chap. IX. sect. 3.

11. Where there are no next of kin.

11. Where no next of kin.

In closing the present section, we observe, that when in a will not affected by the 1 Wm. 4, c. 40, there are executors appointed, and they are not excluded from taking beneficially by any of the rules before discussed, and there are *no next of kin*, the executor's right will prevail against the Crown (u). But where there are no executors appointed, or being such, they are excluded expressly, or by construction of the Court of Chancery, or by the operation of the above statute, and there are no next of kin, the Crown will be entitled to the surplus of the personal estate undisposed of; and if there are executors appointed, they will be trustees for the

(s) *White v. Evans*, 4 Ves. 21, *supra*, p. 1701; *De Mazar v. Pybus*, Ib. 644, *supra*, p. 1717; *Sadler v. Turner*, 8 Ves. 617, *supra*; *Griffiths v. Hamilton*, 12 Ves. 308, *infra*.
 (t) 7 Ves. 425, 444, 446, 451.
 (u) *Russell v. Clowes*, 2 Coll. (C.), 648.

Rights of next
of kin.

Where no next
of kin.

Crown (*v*). But the Crown is only entitled to such part of the testator's property as was personal estate at the time of the death, although the will directs the sale and conversion of the real estate into personalty, for there is no equity in the Crown to call for conversion of the land in order that it may take the proceeds. This principle was recognised by Lord *Loughborough* in *Walker v. Denne* (*w*), and by Lord *Brougham*, C., in *Hencham v. Attorney General* (*x*), and acted upon by Sir *L. Shadwell*, V. C., in the recent case of *Taylor v. Haygarth* (*y*).

In the last case the testatrix gave the residue of her real and personal estate to *A. B.* and *C.*, their heirs, executors, &c., in trust, to sell immediately after death, and to stand possessed of the produce in trust for such persons as she should direct by codicil: the testatrix never made a codicil, and did not leave any next of kin. After her death the executors sold the real estate; and Sir *L. Shadwell*, V. C., held they were entitled to the proceeds for their own benefit; but that the Crown was entitled to such part of the testatrix's property as consisted of personal estate at her death, on the latter point his Honor relied upon *Middleton v. Spicer*; on the former he cited the opinions of Lord *Loughborough* and Lord *Brougham* in the cases above referred to, that there was no equity in the Crown to call for a conversion of the real estate that it might take the proceeds. That the Crown had no equity to claim on the ground of escheat, his Honor relied upon *Burgess v. Wheate* (*yy*).

SECT. III. Rights of the executors to the residue of the testator's personal estate undisposed of.

Rights of ex-
ecutors.

We before (*z*) observed, that the executor, previously to the late act of 1 *Wm.* 4, c. 40, was the testator's residuary legatee appointed by law; and, as such, entitled to all the personal property (except lapsed interests as before (*a*) noticed) which the

(*v*) *Middleton v. Spicer*, 1 Bro. C. C. 201; see *Hawkins v. Hawkins*, 7 Sim. 173, a case of a settlement, and the distinction there made by Sir *L. Shadwell*, V. C. That the Crown has no right to the funds of a married woman as against her husband, she dying without any next of kin. His Honor observed in that case that the fund resulted to the

wife, and went to her husband as her personal representative.

(*w*) 2 Ves. jun. 185.

(*x*) 3 Myl. & K. 485.

(*y*) 14 Sim. 8.

(*yy*) 1 Eden. 177.

(*z*) Vol. I. Chap. VIII. sect. vi. p. 498, and Chap. IX. sect. iii. p. 525.

(*a*) *Supra*, p. 1725.

testator had not meant otherwise to dispose of; and we have shown in the preceding section that, notwithstanding their *legal* title, they would in equity be deemed trustees for the testator's next of kin, in all cases where the intention of the testator was apparent that they should not take beneficially, by virtue of the appointment to that office. The subject of the present section will be the consideration of those classes of cases wherein the legal right prevailed; the inference of intention to exclude them not having been deemed sufficiently manifest.

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ecutors.

The rule was clearly established, that the executor should have the residue, unless there was a strong and violent presumption to the contrary; that a legacy afforded the presumption, was equally well settled; but it was not so strong to take away his legal right, as to deprive him of the opportunity of proving, by *parol* evidence, that the testator did intend he should have it (*b*); unless the legacy to the executor was given to him for his *care and trouble*, or he was otherwise unequivocally named a trustee: for, in such cases, *parol* evidence was inadmissible. Of the admissibility of such evidence we shall treat in a subsequent section (*c*); and in the present, as in the preceding, confine our attention to cases of construction of intention from the will itself, irrespective of any *parol* evidence.

It is scarcely necessary to remind the reader that the several classes of cases discussed or referred to in this and the following section (iv.), are now only applicable to wills of persons dying before the 1st of *September*, 1830, the act of 1 *Wm.* 4, c. 40, having enacted that the executor of persons dying after that time shall not by virtue of his office, be entitled to the residue, but shall in all cases be a trustee for the next of kin (if any), unless it shall appear by the will or codicil that the testator intended he should take it beneficially. This act consequently abolishes the rule before discussed in favour of the executor; consequently *parol* evidence in such cases is not admissible to show the testator's intention that the executors were to take beneficially (*d*).

1. Where there was only *one* executor, and *no* legacy given, and the intention was not otherwise apparent on the face of the will, of course his legal right would prevail. So, where there were *two or more* executors, if the legacies given to them, whether specific or general, were *not of equal* amount, they would not be barred of their

1. Where only one executor and no legacy, or where more than one, and unequal legacies given them.

(*b*) 2 Vcs. jun. 471. 14 Ib. 318.
19 Ib. 646.

(*c*) Sect. 4.
(*d*) *Love v. Gaze*, 8 Beav. 472.

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Where only one
executor and
no legacy, or
where more
than one and
unequal lega-
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legal rights; since an inference arises, from the difference in value, that the testator only intended to prefer some of the executors, to the others; and not to exclude them of any benefits to which they were legally entitled, in their character of executors; for upon a deficiency of assets, such unequal bequests may have a very pointed and singular effect.

The following cases are instances, wherein legacies are given to all the executors, and *unequal* in value.

Thus in *Blinkhorn v. Feast*(e), the testator gave two persons particular specific legacies, severally to each by name, and in the last clause made them joint executors, saying nothing of the residue. The executors were infants. The next of kin filed their bill, claiming the residue; but Lord *Hardwicke* dismissed their bill, being of opinion, that the unequal legacies did not exclude the executors from the benefit of the surplus of the testator's personal estate, for two reasons; observing, "First, he might give these legacies for the sake of the inequality of division of his personal estate among these executors; which is plain; for if it rested on the force of making them executors, it would be equally divided among them; to prevent which, he takes out so much by way of particular legacies, giving such a mortgage to one, and such a mortgage to another, the value of which is unequal. But secondly, another reason might be given, for the sake of their having this by way of distinct interests to themselves in severalty, not liable to survivorship by death of one. Consequently, no implication can arise from hence, that by giving these particular legacies, he meant to make them trustees; and this, strengthened by both being infants, who cannot be intended to be executors in trust for strangers."

In *Bowler v. Hunter* (f), *Frances Bayley*, being possessed of a considerable personal estate, made her will, containing (*inter alia*) the following words: "As to that temporal estate, wherewith it has pleased God to bless me, I give and dispose thereof in manner following." She then gave *T. V. Hunter*, one of the defendants, 200*l*.; and, after many legacies to a variety of persons, among whom were some, but not all of the plaintiffs, the next of kin, she gave to the Rev. *F. Eaton*, the other defendant, 50*l*.; and after some charitable legacies, she appointed *T. V. Hunter* and *F. Eaton*, executors, but made no disposition of the residue. The executors having proved the will, the plaintiffs filed the bill

(e) 2 Ves. sen. 27, 29. See *Belt's* Supplement to this case [262.]

(f) Bro. C. C. 328.

for an account of the residue of the testatrix's estate; praying, that, as the executors had legacies, it might be distributed. The executors admitted assets more than sufficient to pay debts, &c.; but insisted that they had a right to the residuary estate, there being nothing inconsistent with such right in the will, or indicative of a contrary intention, the legacies not being given to them as executors, but by their proper names, and there being a great inequality between them; by which the testatrix shewed, she meant to dispose of the whole, and not to die intestate as to any part of her personal property. Lord *Thurlow*, C., dismissed the bill, in the course of his judgment, observing, "Is the gift of unequal legacies purely the gift of part, in the same manner that they are appointed executors; and is it impossible to assign any other purpose for such a gift, than that of barring the residue. If the gift of the legacy is qualified, it is sufficient to prevent its barring the residue, or it may be given for a different purpose. The gift of unequal legacies may have a different ground from the gift of the whole: it may, in many events, be different; for instance, if 100*l.* be given to one, and 50*l.* to the other, it may be different, in case of deficiency, from giving one 50*l.*, the other nothing. The implication is, that he must have had a different intent, and that must rebut the equity. Lord *Thurlow*'s decree was affirmed upon appeal to the Lords Commissioners.

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unequal lega-
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In *Oliver v. Frewen* (g), a bill was filed by the next of kin against the defendants, the executors, and other parties, for an account of the residue, &c. The question was, whether the executors, some of whom had unequal legacies, and others none, or the next of kin, should take the residue. There was a clause in the will, directing, that in case any legatees should die in the lifetime of the testator, their legacies should go to the executors. *Lawson v. Lawson*, and other cases cited in the last case (h), were recognised in the present, and after a short argument, the *Chancellor* dismissed the bill; being of opinion, that the plaintiff had no right to a share of the residue, but that the same belonged to the executors.

The reader will notice, in consulting the above authorities, a distinction has been attempted between *general* and *specific* bequests to executors, as to the effect of excluding them from the residue, viz., that admitting the former to be a bar, yet the latter will not be so, upon the principle of an intention in the testator

No distinction
between spe-
cific and gene-
ral legacies to
executor.

(g) 1 Bro. C. C. 590. See *Brasbridge v. Woodroffe*, *infra*.

(h) *Bowker v. Hunter*.

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to distribute specific parts of his estate among his executors in different proportions, and not with a view to exclude them from the residue. But this difference, if ever established by any distinct authority, has since been overruled by modern decisions. The case of *Blinkhorn v. Feast* was decided in favour of the executors, not because the legacies were specific, but unequal.

In *Southcot v. Watson*, Lord *Hardwicke* denied the distinction; as also did *Buller, J.*, in *Nourse v. Finch* (i). In *Bowker v. Hunter*, Lord *Loughborough*, upon the appeal, considered the distinction as exploded; and the several cases of *Randall v. Bookey*, *Martin v. Rebow*, and *Holford v. Wood* (j), are additional authorities against the prevalence of any such distinction.

2. So where legacies to some, and none to the other executors.

2. So, where there are several executors, if legacies be given to one or more of them, and no legacies to the rest, the legacies so given will neither exclude the executors receiving them from participating in the undisposed residue with their co-executors, nor convert the executors into trustees for the next of kin.

Thus in *Johnson v. Twist* (k), a legacy of 12*l.* in money, and the use of plate, were given to one executor, and nothing to the other; and Lord *Talbot* held, that there was no reason why the surplus should be distributed among the next of kin, but that it should go to the executors.

Again, in *Colesworth v. Brangwin* (l), *J. S.* having a debt of 50*l.* owing to him from the defendant, by will, forgave him the debt, and gave him 50*l.* more, and some household goods, to the value of 100*l.*, so that in all he gave him about 200*l.*, and made him and the plaintiff executors. *J. S.* made no disposition of the surplus of his personal estate, which was considerable. The plaintiff filed the bill against the other executor, for an account of the personal estate, and that he might have the surplus to himself, upon the pretence that the testator, having given the other executor the above specific legacies, intended him no more; and, therefore, that the whole surplus belonged to the plaintiff. For the defendant it was insisted, that the plaintiff was a mere stranger, and the defendant a near relation of the testator; that he gave him these legacies only, that he might in all events be sure of something; that he took these legacies in another capacity

(i) 1 Ves. jun. 344.

(j) *Ubi supra*, p. 1693, 1694. 1689.

(k) Cited by Sir *John Strange*, in *Wilson v. Ivat*, *supra*.

(l) Pre. Ch. 323. See also the Bishop of *Cloyne v. Young*, *supra*, p. 1782.

than executor; and, therefore, they could not exclude him of his share of the surplus, which the law cast upon him as executor. The Lord *Keeper* was clearly of this opinion, and decreed, that the executors should come in equally for their share of the surplus of the personal estate, notwithstanding the specific legacies given to one executor.

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some, and none
to the other
executors.

Again, in *Buffer v. Bradford* (m), the testator directed the residue of his real and personal estate to be valued; and gave the use of the whole to his sister *Mary Bradford*, during her widowhood; and upon her death or marriage, the whole to be divided in eight parts, and distributed among certain legatees. The testator then added, "I leave also to *John Buffer* and his wife, my nephew and niece, and to their children, for mourning, 40*l*.; and I appoint my sister *Mary Bradford* and *John Buffer* executors." The bill was filed to have the personal estate of the testator secured. Lord *Hardwicke*, C., as to the point, whether a legacy given to one of the executors for mourning for himself, his wife and children, should exclude him from the residue, said, "I should think it very hard to do it, even supposing him sole executor; but as there are two in this will, and a legacy to one, both shall take the surplus equally; and the executor, notwithstanding his legacy of 40*l*. for mourning for himself, his wife and children, is not excluded" (n).

In *Wilson v. Ivatt* (o), the testator made his wife and the defendant executors of his will, and gave her several specific legacies, and made her partial, but not general, residuary legatee (p): he also gave to the wife of the defendant, the other executor, a real estate in fee. The testator's wife died in his lifetime, and the defendant, as surviving executor, claimed whatever residue there might be, as having no legacy. The plaintiffs were the next of kin. Sir *John Strange*, M. R., decided accordingly in favour of the executor, observing, "that the devise of the real estate to his wife, which entitled him to the receipt of the rents in her right, and also to be tenant by the curtesy, if he had a child by her, did not affect the case.

Sir *John Strange*, in the last case, expressed his opinion that the specific things given to the wife lapsed into the residue; and, as forming part of it, went, of course, to the executor, who stood in the testator's place.

(m) 2 Atk. 220.

(n) See also per Sir *John Strange*, in the case next stated, 2 Ves. 166.

(o) 2 Ves. 166. See *Rawlings v. Jennings*, *supra*, p. 1730.

(p) *Bell's Supplement*, 335.

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ecutors.

Legacies to
some, and none
to the other
executors.

Again, in *Griffiths v. Hamilton* (q), the testator, a resident in *India*, gave several legacies, and, among others, directed his executors, whom he should thereafter nominate, to deposit a sum of money at interest on *Indian* security, and pay the interest to his housekeeper for life; and after her death, to pay the principal to the testator's reputed son, *Thomas Halifax*; and appoint *Richard Maidman* and *Joseph Jefferson* trustees and guardians of his reputed son; adding, "I do give and bequeath to *Joseph Jefferson* and *Richard Maidman* the sum of 1,000 dollars, to be divided equally, being a small testimony of my regard." The testator then appointed *Palmer, Jefferson, Griffiths, Maidman, Hoare*, and *Drummond* executors. *Hoare* and *Maidman* proved the will in *India*. All the other executors, except *Hoare* and *Griffiths*, died. *Hoare* having returned to *England*, alone proved the will in *England*, and died; after whose death *Griffiths* proved the will. *Griffiths* claimed the residue as surviving executor. Lord *Eldon*, C., said there was no doubt that *Griffiths*, having probate, must be taken to be executor, and that there had been no severance of the joint-tenancy among the executors, and he decided in favour of the surviving executor. His Lordship observed, that all the authorities agreed, that where the legacies to executors were unequal, they were not trustees; but the effect was a preference *pro tanto* to one; and that the present case fell within that range; that here there certainly was inequality; legacies to two and nothing to the other four. His Lordship, in conclusion, added, "When these persons are intended to be trustees, they are called trustees. The legacies to them are not given in the character of executors, and have no relation to that character, but are given to them before he names them as executors, or intimates his intention to do so. The strongest circumstance is, that he gives these two legacies before he mentions the appointment of executors. If the legacies to these two executors were given for care and trouble, the conclusion would have been, that he intended them to be the acting executors: and, being made trustees, the consequence would follow that all must be trustees. But, as it is expressed, this is a case in which the residue is to be taken by the executors; and there is no one to contest it with them for the reasons I have given."

In addition to the preceding cases, the reader is referred to *Pratt v. Sladden* (r), stated in a former page.

(q) 12 Ves. 298.

also *Langham v. Sandford*, 19 Ves.

(r) 14 Ves. 193, *supra*, p. 1711. See 648. Per Lord *Eldon*.

In *Dawson v. Thorne* (s), the testator gave the interest of 2,400*l.* navy, five per cents. to his sisters, *Elizabeth* and *Fanny*, for their lives, and the life of the survivor; and after other legacies to other sisters, his will concluded thus: "I wish my servant, *Mary Burton*, and *Thomas Dawson*, to be my two executors. I wish my servant, *Mary Burton*, to live with my sisters, *Elizabeth* and *Fanny*, and to provide for them as she did in my lifetime, *Mary Burton* receiving the interest of the money which I leave to *Elizabeth* and *Fanny*, and laying it out to the best advantage for them." On the other side, there was a testamentary writing, in the form of a letter, to *Dawson*, signed by the testator in these words: "Dear *Dawson*, I have in my will left you and *Mary Burton* my two executors. What you used to pay me half-yearly, you will now pay to *Mary Burton*, as wages, for looking after my two poor sisters, *Elizabeth* and *Fanny*. When *Mary Burton* is too old for service, you must get *Kitty Toms*, or some other steady good sort of a person, to look after them. When *Mary Burton*, and *Elizabeth* and *Fanny* are dead, let my sister, *Martha* have it all." *Dawson* admitted he was indebted to the testator 300*l.*, for which he paid him interest half-yearly. The question was, whether the executors took the residue beneficially, including the reversion of the 2,400*l.* navy five per cents., and this turned upon the point whether the legacy given to *Mary Burton* was given her for care and trouble as executrix; and, if so, one executor being a trustee, both were so. Lord *Lyndhurst*, C., was of opinion that the interest of *Dawson's* debt, given as wages for *Mary Burton's* attendance upon the testator's sisters, was not given to her for care and trouble as executrix, and consequently that she and *Dawson* were entitled beneficially. His Lordship also observed, that after the death of *Elizabeth* and *Fanny*, *Mary Burton*, if she survived, would be entitled to the interest of the 300*l.* during her life; for it was not till after the death of *Mary Burton*, and the testator's sisters, *Elizabeth* and *Fanny*, that this sum of 300*l.* was to go over to *Martha Pierce*.

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some, and none
to other ex-
ecutors.

3. Upon the same principle, viz., the want of inconsistency between the legacy and taking the residue, it has been determined that if the legacy given to the executor operate by way of exception out of another bequest to a third person, such a gift shall not prevent the executor from taking the residue.

3. Where the
legacy to the
executor is by
way of excep-
tion out of
another legacy.

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ecutors.

Where the le-
gacy to the ex-
ecutor is by
way of excep-
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another legacy.

Thus in *Griffith v. Rogers* (t), the defendant's husband bequeathed his library of books to A., (except ten books, such as his wife should choose, as plays, romances, sermons, but not law books), and made her executrix. The question was, whether the legacy to the wife should exclude her from the residue; and it was determined in the negative, the *Lord Keeper* observing, that it was no devise of the ten books to her, but only an exception of ten out of the devise to A., and that the executrix was the proper person to choose which should be excepted; besides, that it could not be thought the testator intended to bar his wife of the benefit of the executorship, by so inconsiderable a bequest.

So in *Jones v. Westcomb* (u), the testator, being possessed of a long term for years, bequeathed it to his wife for life, remainder to the child with which she was then *enceinte*; but if such child died before twenty-one, then he gave one-third part of the term to his wife, and the other two-thirds to other persons, and appointed his wife executrix. The wife happened not to be *enceinte*, and the bill was filed by the testator's next of kin for an account and distribution of the residue. The question was, whether, as the term was part of the personal estate, and expressly bequeathed to the wife for life, with such other contingent interest upon the death before twenty-one of the child supposed *in ventre matris*, she was not excluded from the residue, which belonged to her as executrix; so that such residue should go in a course of administration, and be distributed among the plaintiffs as next of kin? But the Court dismissed the bill, and decreed the residue to the executrix.

In *Hoskins v. Hoskins* (v), the testator bequeathed the use of household goods to his wife during widowhood, and made her executrix during widowhood, and if she should die or marry, he appointed his son and heir executor. He also bequeathed some curiosities and rarities to remain as heir looms in his family; and the question was, if the widow, who had this legacy of the use of the household goods *durante viduitate*, was entitled to the undisposed residue, or it should be distributed according to the statute? The *Lord Keeper* was of opinion, that she should have the surplus, she having a limited executorship only, and said, though the Court had distributed the surplus, when the executor had a legacy, upon a supposed intention of the testator, that he intended him no more; yet, in the present case, it could not be intended so as to exclude the heir, when his executorship

(t) Pre. Ch. 231.

(u) Ib. 316.

(v) Ib. 263.

should take place; for, as to the heir-looms, they appear to be given with another intent, and not to exclude him from the surplus, neither should the wife be excluded.

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ecutors.

Where the le-
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another legacy.

In the *Duchess Dowager of Beaufort v. The Duke of Beaufort* (t); the then late Duke of *Beaufort* by his will, in 1699, made the following bequest: "I bequeath *the use* of my silver plate for the service of my table, that is to say, of all my silver dishes, trencher plates, with my great silver cistern, with the silver sconces, to my dear wife, during the term of her natural life; and after her decease, I do hereby bequeath all the said silver plate to my grandson, *Henry Somerset*, commonly called Marquis of *Worcester*. I do likewise give unto my grandson, one diamond jewel, which I usually wear in my hat upon *St. George's* feast, with all my *Georges*, Parliamentary robes, and my robes of the order, to be laid up and preserved, and delivered to him, at such time as my wife shall judge convenient;" and he appointed his wife sole executrix. Upon the same day he made a codicil to his will, and gave his wife a rent-charge of 500*L.* a year, out of his houses called *Beaufort* Buildings, but made no disposition of the residue of his personal estate, either by the will or codicil. The testator died soon afterwards, possessed of personal estate, of the value of 50,000*L.*, which the Duchess considered as her own, and expended large sums of money in the endowment of several charities, and in other acts of piety and munificence, which she knew were agreeable to the testator's intentions, and which he would have done himself, if he had lived longer. No interruption was given to the Duchess in the enjoyment of this personal estate by any of the family, for about nine years after the testator's death; but at length, in 1709, the respondents filed a bill in Chancery against her, for an account and distribution of the surplus of the testator's personal estate, as in the case of an intestacy. In *February*, 1709, the cause was heard before Lord Chancellor *Cowper*, when he declared, that the testator ought to be considered as having died intestate, as to the undisposed residue of his personal estate, which ought to be distributed according to the statute (u).

The Duchess having appealed from this decree, it was contended, on her behalf, that by the known rule of law, the right to all the testator's personal estate, not otherwise disposed of, belonged to the executor, so that the appellant had most undoubtedly the law in her favour. That the devise of the use of

(t) 1 Bro. Parl. Ca. 306.

(u) 1 P. Wms. 114.

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ecutors.

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another legacy.

the plate to the appellant for life, which was the only legacy given her by the will, with a devise over at the same time to the respondent, the Duke, who had thereby the absolute property, was not such a legacy to the appellant as could be construed to exclude her from the benefit of the surplus of the testator's personal estate, it being only in the nature of an exception, or saving of the use of the plate to the appellant, for her life, out of the bequest of the plate itself to the then Duke, and which was perfectly consistent with her having the surplus of the estate as executrix. That by this bequest, the general property of the plate was in the then Duke, the appellant having no more than the bare liberty of using it, so long as she lived; and Courts of Equity had never gone so far as to deprive an executor of the surplus of the personal estate, where only the use of a particular thing, and for a particular time, was given to the executor, and where the property of that very thing was given over to another. That it could not be imagined that the testator, who had entirely trusted the Duchess with the management of all his affairs for many years before his death, and who often acknowledged, as was proved in the cause, that by her great care and conduct, his real and personal estates were very much increased, would have left her nothing out of his personal estate by way of legacy, either as a mark of his esteem, or for her own convenience, besides the use of his table plate, if he had not intended that she should have the benefit of all his personal estate, after payment of his debts and legacies. It was admitted at the hearing of the cause, that if the testator had devised the plate to the then present *Duke*, after the appellant's death, without any express devise of the use of it to her in the meantime; or, if he had devised the plate to the Duke, reserving the use of it to the appellant for life; in either of these cases, the appellant would not have been barred of the surplus of the estate by any implication; and yet the words of the will plainly meant the same thing, and varied only from the cases so put in the position of the words, but not in the mind or intent of the testator. That the intent of a will, upon the whole frame of it, and not any particular words by themselves, much less the mere position of those words, ought chiefly to be regarded, and the naming the appellant first in the bequest before any other, might be out of respect to the dignity of her person. That it was proved in the cause, that the testator fully intended that the appellant should have the surplus of the personal estate to her own use; and this proof, as it agreed with the rules of law

to preserve the legal title to the executrix, and which of common right she had, so it should prevent, and ought to rebut the construction of a Court of Equity, which would create a resulting trust, and make the executrix a mere trustee for the next of kin; and that the case of *Foster v. Munt* (x), upon which the decree was founded, was manifestly different from this case in various particulars, for in that case the executors were strangers, and had no relation to the testator; the legacies given to them were a beneficial bequest in money, for their care and pains in the execution of the will; that it did not appear that the testator had any previous obligation to them in his lifetime, nor was there any proof that he intended the surplus for them. It was insisted for the respondents, that the appellant by having a specific legacy under the testator's will, was excluded from the residue as executrix, and therefore that the decree was proper; but the Lords adjudged that the decree should be reversed.

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ecutors.

Where the le-
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ecutor is by
way of excep-
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another legacy.

In *Newstead v. Johnston* (y), the testatrix bequeathed several legacies to her children, and directed 1,000*l.* to be taken out of her partnership stock in trade, and settled in strict settlement upon her son; the residue of her partnership stock she gave to a trustee, with very particular directions as to the management, in trust for the separate use of her daughter *E. Johnston*, who was a married woman, and appointed *E. Johnston* executrix, making no disposition of her residuary estate. The question was, whether the executrix was barred of the residue by the provision in the will? Lord *Hardwicke* was of opinion, the present case fell directly within the reasoning of *Griffith* and *others*, and the Duchess of *Beaufort* in the House of Lords (z), observing, "Giving a share in the partnership stock to *S.* in trust for the wife, is consistent with intending her the residue; for had it not been done in this manner it must have sunk in the residue, and the husband by this mean would have been entitled to it; consequently, I can never say an implication arises from hence, that the testator has excluded the executrix from the benefit of the surplus, for implications must flow from natural and necessary consequences. This was not a legacy, but an exception out of the legacy she had given of the partnership stock to the son."

(x) 1 Vern. 473, *supra*, p. 1686.

v. Watson, 3 Atk. 226, *supra*, p. 1687.

(y) 2 Atk. 45. See also Lord

(z) *Supra*.

Hardwicke's observations in *Southcot*

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ecutors.

Where the le-
gacy to the ex-
ecutor is by
way of excep-
tion out of
another legacy.

Where legacies
to executors
are given out of
freehold estate,
they will not be
excluded from
surplus.

It is apprehended, that if the legacies bequeathed to the executors are originally given out of freehold estates, and are only payable out of that fund, such legacies will not convert the executors into trustees of the residuary personal estate; for in those instances it cannot be contended that the legacies are inconsistent with the legal right of the executors in the undisposed personality (a).

The reader is here referred to the preceding section for other classes of cases, wherein the executor is not excluded, and which formed exceptions to the subjects there discussed, but which may here again be enumerated, as forming, in point of *arrangement*, part of the present section; they are the following:

4. Where the legacy to the executor is a *reversionary contingent interest*, but which is not free from doubt. See section II. division 1, § E. (b).

5. Where the executors are only named *trustees* for a *specific purpose*. Sect. II. div. 4. (c).

6. Where the intention to dispose of the residue is ambiguous. Sect. II. div. 7 (d).

7. Where the residue is bequeathed to executors as *joint-tenants*, or as a *class*, and the share of one or more of them lapsing, survives to the rest. Sect. II. div. 9 (e).

We close the discussion comprised in the present and preceding sections with the following appropriate observation of Sir *William Grant*, in *Pratt v. Sladden* (f): "So long as the doctrine of the Court, with regard to the right of executors to the residue of personal estate not expressly disposed of, shall stand upon its present footing, it is impossible to lay down any rules to prevent the frequent recurrence of this question; for as it is always open to the next of kin to show intention from the particular wording of the will, adverse to the effect of the legal appointment of executor, the circumstances from which it may be endeavoured to deduce that intention may be infinitely varied. Some Judges have been disposed to give way to a very slight indication of intention against the executors; and almost to put them upon proof of an intention in their favour. The modern

(a) See 2 Scho. & Lefroy, 542.

(b) *Supra*, p. 1700.

(c) *Ib.* p. 1711.

(d) *Ib.* p. 1730.

(e) *Ib.* p. 1734.

(f) 14 Ves. 197.

doctrine, however, is, that the executor shall take beneficially, unless there is a strong and violent presumption that he shall not so take; for Lord *Thurlow* used too strong an expression, when he said, it must be an irresistible inference" (g).

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ecutors.

Where the le-
gacy to the ex-
ecutor is by
way of excep-
tion, out of
another legacy.

SECT. IV. Of the admissibility of *parol evidence* by the executors and next of kin, with reference to their claims to the undisposed of residue.

Notwithstanding the Court of Chancery is jealous of the admission of *parol evidence* affecting written instruments, it permitted its adoption in several cases in connection with the subject of the two preceding sections. On the one hand, where a legacy was given to the executors, or there were other expressions in the will, which afforded an inference or a presumption in favor of the next of kin, the executors were allowed to produce *parol evidence* to rebut the presumption so raised against their legal right; unless, indeed, the will contained express declarations that the executor was to be a trustee (h); as where the legacy was given for their care and trouble (i), or where the intention otherwise appeared clearly and conclusively upon the face of the will, that the executor was meant to be a trustee: for in such case, the admission of *parol evidence* would be to contradict the will. On the other hand, the next of kin were likewise allowed to produce evidence, to encounter that of the trustees in support of the presumed trust in their favour. But where there was no legacy to the executor, or other expressions to raise the presumption in favor of the next of kin, and it was clear, according to the construction of the Court of Equity, that, upon the face of the will, the legacy was given so as not to be inconsistent with the executor taking the beneficial interest in the residue, *parol evidence* by the next of kin was not admitted, to show that the executor should not take the residue (k).

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evidence.

But now by the 1 *Wm.* 4, c. 40, the executors of wills of persons dying upon or after the 1st of *September*, 1830, shall not take by virtue of their office the residue beneficially, but shall, in all cases, be trustees for the next of kin, if any, unless it shall appear by *the will or codicil* that the testator intended they should

(g) *Clennell v. Lewthwaite*, 2 Ves. jun. 471.

(h) 5 Mad. 59. *Glading v. Yapp*, *infra*.

(i) *White v. Evans*, 4 Ves. 21, *supra*, p. 1701; 7 Bing. 628.

(k) See 19 Ves. 643, 646.

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take beneficially: and parol evidence is not admissible to show the testator intended the trustees should take beneficially (*k*).

The law for admitting evidence in the above instances was, previously to the above statute, unquestionably settled by the cases, which will be adduced; yet successive learned men have regretted that the rule was ever so established. In *Blinckhorn v. Feast* (*l*), Lord *Hardwicke* expressed a doubt as to the propriety of admitting such evidence, though that doubt seems to have been removed previously to his decision in *Lake v. Lake* (*m*): and *Buller, J.*, in *Nourse v. Finch* (*n*), though he admitted the rule, lamented that it was so settled, and was of opinion that it became established gradually, upon a misconception of the earlier cases.

1. Adduced by the executors.

1. The following cases are principally instances wherein the evidence has been adduced by the executors in support of their legal right. The cases in the present section will be stated much at length, with a view to illustrate the nature of the evidence which has been adduced.

In the case of *Lady Granvill v. The Duchess of Beaufort* (*o*), stated above under the title of the *Duchess Dowager of Beaufort v. The Duke of Beaufort*, a question arose, whether parol evidence should be admitted to prove that the testator intended to give the surplus to the executrix, and that he gave such instructions to the person who drew the will, and was since dead: and the Court was of opinion, upon argument, that the *proofs* should be read, to rebut an implication or rule in equity, that the surplus should be taken from the executors, and distributed.

Again, in *Batchelor v. Serle* (*p*), *W. Allen* bequeathed several legacies to his relations, and amongst the rest to his sister, the wife of the plaintiff, about 1,000*l.*; and he gave 70*l.* to *Serle* and wife, and their four children, to buy mourning; and to *Sarah Serle*, one of the daughters of *Serle*, to whom he had made his addresses, 500*l.*; and gave his horse and furniture to one of the executors by name, and his clothes to be disposed of by his executors; and then concluded, "As to the 700*l.* I am entitled to in the South Sea Company, and the rest of my personal estate, I will, that the same should be sold for payment of my debts and legacies, and I make Mr. *John* and Mr. *Thomas Serle*

(*k*) *Love v. Gaze*, 8 Beav. 472.

(*l*) 2 Ves. sen. 27.

(*m*) *Infra*.

(*n*) 1 Ves. jun. 344, *infra*.

(*o*) 2 Vern. 648.

(*p*) 1 Eq. Ca. Abr. 246.

my executors." The executors were two of the children of *Serle*, but not related to the testator, and were entitled to their proportion of the 70*l.* bequeathed for mourning, and one of them to the horse and furniture. The surplus of the personal estate amounted to about 600*l.*, and the bill was filed against the defendants, the executors, for an account thereof, and that it might be paid to the plaintiff, whose wife was the only sister and next of kin to the testator. For the plaintiffs it was insisted, that the executors were mere strangers to the testator; and that they had particular legacies left them for mourning, out of the 70*l.*, and one of them had a horse and furniture expressly bequeathed to him; and, therefore, it was not reasonable that they should go away with the residue. On the other side, it was insisted, that the defendants, being executors, represented the testator; that they stood in his place, and were entitled to whatever he left undisposed of; that this was the ancient law for many ages; and, therefore, the legal title being in them, they ought not to be defeated of it, without a manifest intention of the testator to the contrary: that there appeared no such intent in the will, for they were not named, either by their Christian names or surnames, or so much as by the name of their office, till the very close of the will; that it was in proof, that the testator did not so much as consider whom he should make his executors, till he had disposed of all the legacies; that the giving one of them his horse and furniture was only to exclude the other, who, by being executor with him, would have been equally entitled to it; and it could not be construed a legacy to shut them out of the surplus, since, it rather regarded the other executor than the plaintiff, the next of kin; that they had it fully in proof, that the testator, being asked whether he would not give his sister more, answered he would not; that being asked who should have the surplus, or what should become of the surplus, he said his will should stand as it was, and that he had a very great regard for the defendant's family, and was to have married their sister; that these proofs, being in affirmance of the disposition which the law made to the executors, might be read; and that several resolutions, since the case of *Foster* and *Munt*, had pared away the authority of that case; and therefore prayed, that the bill might be dismissed. *Lord Cowper*, C., was clearly of opinion, that the proofs, being in affirmance of the disposition, ought to be read; and said, that they were so full as to make an end of the case; that, without a strong and violent implication, the executors ought not to be defeated of the residue; that there

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was no such implication in the will, but rather the contrary; that to make sense of the last clause, it must be construed as a devise of the South Sea stock, and the rest of his personal estate, to his executors; for it immediately followed, “and I make *John and Thomas Serle* my executors,” which could have no relation to the direction for sale, unless by giving them the surplus which should arise by sale; and as there appeared no strong or violent implication to induce any other construction, he could not give in to so great a change of the law, but must decree for the executors; which his Lordship did accordingly.

So also in *Gainsborough v. Gainsborough* (q), the Earl of *Gainsborough*, having by his will, subjected his real estate to the payment of his debts, made the plaintiff, the Countess, his executrix, intending, as was alleged by the plaintiff, that she should have all his personal estate to her own use, free from his debts; but that *Bilbourne*, who drew the will, either through some ill design or ignorance, omitted to insert a devise therein of the personal estate to the plaintiff, pretending that the making her executrix amounted to as much, and was the same thing in effect. The plaintiff complained that the creditors threatened to follow the personal estate, whereas a sufficient provision was made for them out of the real estate; and she insisted, that if the personal was exhausted or applied in payment of the debts, she ought to be reimbursed out of the real estate; and prayed she might be at liberty to examine witnesses as to the declarations of the testator, that the plaintiff as his relict and executrix, should have his personal estate to her own use. As to so much of the bill as sought to examine witnesses concerning the testator's intention or declaration, that the plaintiff should have his personal estate to her own use, or to examine as to matters *dehors* and foreign to the will, the defendant demurred, because it appeared by the bill, that there was a will in writing, proved by the plaintiff; and that it was a dangerous tendency to admit parol proof to control, vary, or alter such a will; and particularly in this case, as the plaintiff had not so much as attempted to prove such parol declaration as a codicil in the Ecclesiastical Court. Upon argument of the demurrer, it was said by Serjeant *Hutchins*, then one of the Lords Commissioners, that he thought the bill ought to be answered, and the plaintiff permitted to prove her allegations. With respect to the objection, that the plaintiff had not proved the declaration of the testator, that she

should have the personal estate to her own use, as a codicil in the Spiritual Court, he thought it unnecessary in this case, in regard that the averment was not to make a title to the plaintiff, but to rebut the defendant's equity, who would have the personal estate applied to the payment of debts in exoneration of the real. He relied much upon the case of *Crompton v. North*, where the testatrix devised her lands to Mr. *North*, to sell, for the payment of her debts; the heir filed his bill, insisting, that, as to the surplus after payment of debts, it belonged to him as a resulting trust, being undisposed of by the will. The defendant insisted, there was no resulting trust, and that the testatrix had declared, she intended the surplus for the defendant. Upon the hearing, there were two questions—first, whether a fee passed by the will? and it was adjudged there did: secondly, whether there was any resulting trust after satisfaction of the debts? and it was determined in the negative, without reading the depositions by which it was proved, that she declared her trustee should have all. But the Court there declared, that the estate in law being vested in the devisee, he should have been admitted to his proof of the testatrix's parol declaration, if it had been necessary: and this was in the case of land; *à fortiori* might parol proof be admitted as to personal estate: and he cited the case of *Foster v. Munt*, and *Pring v. Pring* (r), where the executor who confessed the trust, was examined, and read against the other executor, who denied it. Serjeant *Rawlinson* cited a case of *Kingsmill v. Ogle*, where the surplus by will was devised to the wife; averment taken that she was intended as a trustee only for her son, and that the testator made such a declaration at the making of his will. The decree was grounded upon the proof of that declaration. The Court accordingly directed an answer to the bill.

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Again, in the case of *Wingfield v. Alkinson* (s), the testator gave to the plaintiff, his sister's son, and to his nephews, sons of his brother, his next of kin, 100*l.* a piece, and made the defendants *Atkinson* and *Myres*, not related to him, executors, giving them also 100*l.* a piece. The question was, whether the executors or the next of kin should have the residue? And it was decreed in the *Mayor's Court* in favor of the next of kin; but upon appeal to the *House of Lords*, the executors were allowed to read the depositions of witnesses, to shew that the testator intended them

(r) *Supra*, p. 1703.

(s) 2 Vern. 673.

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the surplus; and upon the effect of that testimony, the Lords reversed the decree.

In *Petit v. Smith* (*t*), the testator, having a daughter and two brothers, bequeathed 5*l.* a piece to his brothers, and appointed them executors, making no disposition of the surplus of his estate. The daughter, as next of kin, filed a bill against the executors, for an account of the residue, and although there were proofs that the testator intended his executors should have the surplus, in regard that the daughter had incurred her father's displeasure, by marrying without his consent; yet, the evidence being somewhat doubtful, it was decreed first by Sir *John Trevor*, M. R., and afterwards by Lord *Somers* on appeal, that the executors should be but trustees of the residue, after payment of their legacies, which should go according to the Statute of Distributions. It was said by Lord *Somers*, that equity delighted in equality, and that the distribution according to the statute was most agreeable to natural justice. That it was dangerous to admit parol proof, where there was a will in writing; but in relation to personal estate, the Court would allow proofs and averments, but then that such proofs ought to be plain and indisputable, to entitle the executor to the benefit of the residue; and he cited Lady *Gainsborough's* case (*u*).

In *Heron v. Newton* (*x*), the testator appointed two persons executors of his will, and gave them specific legacies, desiring them to be kind to *Sarah Tufton*, his old servant, and to give her some small pieces of furniture then in his house, if she desired them. The question was, who should have the residue of the personal estate after the debts and legacies were paid; and it was decreed in favour of the executors, it appearing from the parol evidence (*y*), which was read in the cause, that the testator intended the residue should belong to them.

Again, in the *Duke of Rutland v. The Duchess of Rutland* (*z*), Lady *Rachael Manners*, sister to the plaintiff the Duke of *Rutland*, having a portion left her by her father, the late Duke, and being entitled to other money, which in the whole amounted to about 10,000*l.* and was either secured by mortgages, or charged upon lands, made her will, in the beginning of which she noticed the particulars of what her estate consisted, and

(*t*) 1 P. Wms. 7-9.

(*u*) *Supra*, p. 1754.

(*x*) 9 Mod. 11.

(*y*) Reg. Lib. A. 1722, fol. 231.

(*z*) 2 P. Wms. 210.

that she intended to dispose of the same by her will. She then gave to her brothers and sisters, and to her half-brothers and sisters, pecuniary legacies, particularly to the plaintiff, her eldest brother, 500*l.*; but made no disposition of the residue of her personal estate, and appointed the Duke sole executor. There were three witnesses to the will; the Duchess of *Devonshire*, Mr. *Vernon*, a clergyman, who drew the will, and a servant. Mr. *Vernon* said, that the testatrix gave no express instructions for leaving the surplus to the Duke, but that he understood and supposed that his Grace was to have it, and for the following reasons: because she made him sole executor; and when she had given several legacies, he asked her if she would give any more, to which she answered, "No;" that upon his asking her whom she would make executor, she replied, the Duke, her brother, sole executor; and she hoped his Grace would not take it ill, that she had given so much away from him; and that the next day she sent to the Duke, desiring him to take care of a legacy of 100*l.*, which she had directed to be paid to the poor. The Duchess of *Devonshire* swore, that, to the best of her remembrance, the testatrix being asked at the time of making her will, whether she intended that the residue should go to the Duke, her executor, answered, "Yes." The servant deposed, that the testatrix being asked whom she designed to have the surplus, expressly answered, "The Duke, my brother." To all which it was objected at the opening of the cause, that parol evidence relating to the declarations of the testatrix, whom she intended to have her residuary estate, ought not to be read, as it would introduce all the mischief and inconvenience, which the Statute of Frauds was made to prevent. But Lord *Macclesfield*, C., directed the evidence to be read, saying, "We will judge of it afterwards." The evidence having been read, his Lordship decided in favour of the executor upon the evidence.

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So in *Brasbridge v. Woodruffe* (a) the executors had legacies, one of 200*l.* and the other of 100*l.*; and it was said, that if it appeared in proof by parol evidence, that, both before and after the execution of the will, the testatrix always declared that the next of kin (who were the plaintiffs in this cause) should have nothing, and that she would not leave them anything by her will, the executors should notwithstanding have the residue. It was objected on the part of the plaintiffs, that where the residue was undisposed of, evidence of the testatrix's intention to exclude

(a) 2 Atk. 69.

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sibility of parol
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executors.

the next of kin was not sufficient to give the surplus to the executors; that the evidence ought to be positive she had it in contemplation to give it to them at the time of making the will. *Verney, M. R.*, dismissed the bill, being satisfied, that to give the residue to the next of kin would be to give it contrary to the intention of the testatrix. The Court would certainly favour the next of kin, where they could do it consistently with the rules of equity and justice; but that did not tie him down from inquiring into the intention of the testatrix; for, wherever there was evidence that would satisfy the mind of the Court as to the intention, they would depart from their general rules, though they would not do it upon slight proofs. The gift of 200*l.* to one executor, and 100*l.* only to the other, was a presumption, upon the face of the will, that it was not intended to exclude them from the residue, but only to show a preference to one of them. In answer to the objection of the plaintiff's counsel the Master of the Rolls said, "*It is enough if the Court is satisfied as to that single fact, that the next of kin were not to have it, for there is no medium between the next of kin and executors; for if it appear that the intention was to exclude the next of kin, the executors must have it of course.*"

In *Buckley v. Littlebury (b)*, the testator, by his will in *December 1709*, gave to the respondent, who was his brother of the half blood, and to his wife, a legacy of 10*l.* each; to their four children, 50*l.* each, to be paid at their ages of twenty years; to *Sarah Lynch*, his housekeeper, 600*l.*, with the furniture of his house, and as full possession of every thing therein, as he had at that time (books excepted); and to the appellant, all sums of money which were or should be due from him to the testator, upon bond or note: together with whatsoever might be due to the testator from *Paris, Rome, or Lisbon*, for goods formerly sent thither; and he appointed the appellant sole executor of his said will, which the testator therein declared, he had made and written with his own hands. Soon afterwards the testator died, and, the appellant having proved the will, the respondent in *October 1710*, exhibited his bill against him, in the *Lord Mayor's Court of the City of London*, for an account of the surplus of the testator's personal estate, not disposed of by his will. To this bill the defendant put in an answer; and insisted, that the testator did not design the plaintiff should have any more of his personal estate, than what he had given

(b) 1 Bro. Parl. Ca. 340.

him by the will; but that he intended the benefit of the residue of his estate, after debts and legacies paid, for the defendant; and that the making him executor, was a gift in law to him of all the personal estate. The cause was heard before Sir *Peter King*, then Recorder of *London*, in *April* 1711, who decreed that the defendant should account with the plaintiff for the residue of the testator's estate, and referred it to the two attornies of the Court, who were neuter in the cause, to take and settle the account, and make the defendant all just allowances. From this decree the defendant appealed; insisting, that it manifestly appeared, from the *proofs* taken in the cause, that the testator not only intended to exclude the respondent from any other share of his personal estate, than what he had expressly given to him and his family by will; but also, that by making the appellant his executor, he should have all the residue of his personal estate. That it likewise appeared by the *proofs*, that for many years before the testator's death, there was a very strict and uninterrupted friendship between him and the appellant; and that the appellant had been very serviceable to the testator, and, that he constantly declared to his friends and acquaintance, that at his death he designed to give the appellant his personal estate, as some recompense to him, and as a mark of the affection and esteem which he had for him. That the making the appellant executor of his will, according to the legal notion of an executor, fully answered the testator's intention; and as there was not in this case the least pretence or colour of any fraud or imposition, so there was no ground to raise a *trust* for the respondent's benefit, contrary to the testator's design of making the appellant his executor, and to his own explanation of what he intended by doing so. On the other side it was contended, that the residue was not disposed of by the will to any person. That the appellant, having a considerable legacy given to him, was not entitled to the residue; but that, according to many precedents in the Court of Equity below, the respondent, who was the testator's next of kin, was well entitled to the benefit of it; and it was, therefore, hoped that the decree would be affirmed. But it was ordered that the decree complained of should be reversed.

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Again, in *Lake v. Lake* (c), the testator by his will gave to his wife, 1,400*l.*, in case the marriage bond of 400*l.* was not brought in to lessen the legacies or lands charged with payment of the

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In *Buckley v. Littlebury (b)*, the testator, by his will in December 1709, gave to the respondent, who was his brother of the half blood, and to his wife, a legacy of 10*l.* each; to their four children, 50*l.* each, to be paid at their ages of twenty years; to *Sarah Lynch*, his housekeeper, 600*l.*, with the furniture of his house, and as full possession of every thing therein, as he had at that time (books excepted); and to the appellant, all sums of money which were or should be due from him to the testator, upon bond or note: together with whatsoever might be due to the testator from *Paris, Rome, or Lisbon*, for goods formerly sent thither; and he appointed the appellant sole executor of his said will, which the testator therein declared, he had made and written with his own hands. Soon afterwards the testator died, and, the appellant having proved the will, the respondent in October 1710, exhibited his bill against him, in the Lord Mayor's Court of the City of London, for an account of the surplus of the testator's personal estate, not disposed of by his will. To this bill the defendant put in an answer; and insisted, that the testator did not design the plaintiff should have any more of his personal estate, than what he had given

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same. He gave unto his wife all his lands at *Barley*, which he then enjoyed; and he gave her, whilst she remained a widow, the house *F. C.* lived in, with the lands belonging, and after her marriage to *Lake*, in fee; and made her executrix. The question was, whether the wife was entitled to the surplus of the personalty, or was a trustee for the next of kin? A witness deposed, that the testator, being taken ill on a tour (of which illness he died), told him, if he should die, he had taken good care of his wife, and had given her pretty near half his money, as a sum certain, and said, he had given his wife a particular legacy, for fear his estate should not hold out; but hoped, if she had good luck, in collecting his effects after his decease, there would be, after his debts paid, something left, which would be all her own; and then said, he had omitted something, which, if he lived to return home, he would do for the benefit of his wife. Lord *Hardwicke* said, "I need not enter into the general ground upon which determinations have been made in cases of this kind, for the testator has fully explained himself;" and his Lordship dismissed the bill.

Again, in *Nourse v. Finch* (*d*), Sir *Charles Nourse* began his will dated in 1789, in this manner, "As to all my worldly estate, with which it hath pleased God to bless me, I give and bequeath as follows." And after disposing of much property in specific legacies, he gave to Miss *Finch*, out of the true regard and affection he had for her, the house he dwelt in, and another in fee, provided she continued unmarried; but if she did not, remainder over. He also gave her, "All the furniture, linen, plate, glasses, china, carriage, books, (with a few exceptions), jewels, watches, liquors, wearing apparel, cash in the house, and all other things then used in the premises, provided she did not marry; but if she did, then over. He gave 15,000*l.* stock to trustees, upon trust for Miss *Finch* for life, upon the same condition. He also gave a mortgage of 2,500*l.* in trust for Miss *Finch* for life, upon the same condition; with remainder over upon her marriage. He gave her 1,100*l.* secured to him by the Commissioners of the *Oxford Market*, with the arrears, to dispose of as she should think fit. He then gave 4,000*l.* stock in trust for his sister for life. He bequeathed to Dr. *Chapman* and another person, his trustees, 100*l.* each for their trouble, appointed Miss *Finch*, who was a relation, his sole executrix, and directed the legacies to be paid

(*d*) 1 Ves. jun. 344; 4 Bro. C. C. marks upon this case, 19 Ves. 650. 239, S. C.; see Lord *Eldon's* re-

within twelve months after his death, or as much sooner as might be convenient to her. There was no residuary clause. After the testator's death a sketch of a codicil was found wrapt up with the will, but not executed, nor had the blanks which had been left both for names and sums, been filled up. It was in the following form; "Whereas, I have not in my will disposed of the residue, I give out of the said residue ——— and all the residue ———." The bill was filed by Mrs. *Nourse*, the testator's only sister, claiming, as sole next of kin, a residue of 8,000*l.* as undisposed of. The plaintiff had, besides the legacy in the will, 250*l.* for life; and was eighty-four years old at the execution of the will.

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Both parties went into evidence. The evidence for the plaintiff consisted of the depositions of *John* and *Thomas Walker*, brothers, and attornies of character, and friends of the testator. *John Walker* lived in or near *Oxford*, which was the place of the testator's residence; *Thomas* lived at *Woodstock*. Their evidence was to the following effect: "*John Walker* prepared the will from the instructions of the testator, given on the 10th or 11th of *February*, 1789, at which time the deponent *John* observed that the residue was not disposed of; to which the testator replied, that he meant to dispose of it by a codicil of his own making. By the testator's directions *John* sent the will to his brother *Thomas*, to be looked over by him. On the 18th of *February* the testator called again upon *John*, in order to execute his will; when *John* again observed to him, that the residue was not disposed of, and advised him to execute a codicil, as it would prevent a Chancery suit between his executrix and next of kin, which otherwise might happen. The testator replied, that he had provided for all the grand objects of his bounty by his will, and would make a codicil in his own handwriting. In the beginning of *March*, 1789, the testator sent word to *Thomas* that he would come over and dine with him, as he wanted to consult with him. The testator came accordingly, and brought his will with him, and asked *Thomas* what he thought of it. *Thomas*, having read it, said he thought it very proper; but observed, that there was no disposition of the residue; but that, as nearly 100,000*l.* was given away, perhaps that would exhaust the whole, and there would be no residue. The testator replied, that there was a residue of 7,000*l.* or 8,000*l.*, which he intended to dispose of by a codicil in his own handwriting; but as he did not know how to frame one, he desired *Thomas* to send a sketch of a codicil to him; and added, that he had some godchildren, and

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other relations; and that Dr. *Willis* was as nearly related to him upon his mother's side, as those provided for by his will were upon the father's side. He also mentioned a charitable institution which he had in view for the benefit of decayed tradesmen, but said he did not feel himself equal to the execution of such a plan at present, and that he had provided for all the principal objects of his bounty by his will, and must defer the rest to another opportunity. *Thomas* then suggested to him that, as he had been at the head of his profession in the county, it would be honourable in him, and was expected from him to give something to the county hospital; upon which the testator thanked him for that suggestion, and said it had escaped him, and that he would do something handsome for the hospital by his codicil; and at parting said, '*Walker*, I promise you not to forget this.' *Thomas* being asked by the testator to whom the residue would go, if not disposed of, answered, that it would go to his sister. *Thomas* was present with Dr. *Chapman*, Mr. and Miss *Finch*, when the will was opened, and being asked how the residue would go, told him it would go to the plaintiff as sole next of kin. In his cross-examination he said, that, to the best of his knowledge and belief, that was his answer. Upon that answer the defendant observing, that the plaintiff did not expect that, *Thomas* advised them to apply to her immediately, as it would prevent all dispute."

The evidence for the defendant consisted of the depositions of *H. Croft*, a clergyman, who had formerly been at the Bar; of *R. Finch*, the defendant's brother; and of Dr. *Chapman*, Vice Chancellor of *Oxford*; all of whom were friends of the testator.

H. Croft, in his evidence, stated, that "the testator, in several conversations with the deponent previous to the will, expressed great regard for the defendant, saying that she deserved very well at his hands; that he should give her at least 30,000*l.*, and could not do enough for her, she was so attentive to him, particularly in his illness. The testator expressed great anxiety lest any unworthy person should marry her, on account of the fortune he should give her, and asked how that could be prevented. The deponent advised him to frame his will so as to give her the residue, which he said he would do. While the deponent was in *London*, the testator wrote to inform him that he had followed the deponent's advice, and taken all the care he could that Miss *Finch* should have the residue, and not be made a prey of, or that she should not be made a prey of; but the deponent having destroyed the letter, could not tell which of those phrases was used. On the 6th of *March* the deponent returned from *London*

to *Oxford*, and the testator, in conversations with him after the will, about the end of *March*, said he was not satisfied with his will himself, though he hoped others would be: for Miss *Finch*, though she would have the residue, would not have so much as she deserved: that he had been much troubled with a doubt whether she would have the residue which he always intended, for the reasons this deponent knew, but that he was contented and happy, because he had been over to *Woodstock*, and was assured that nothing would prevent her from having the residue: that if he did not leave a legacy to the hospital, as had been desired, it would be for the sake of her residue, which he wished was much more; that he was happy at being certain that his will was made as he intended; and that every thing *real* not disposed of would go to his sister, and every thing personal to Miss *Finch*, without any person being able to calculate her property: that by Miss *Finch*'s desire he had written or sent, or done both, to his sister, to inform her of what he had left her by his will; and to offer more if she was not satisfied; but that she said she was satisfied; and that it would be strange if she were not, as she had 250*l.* a-year, besides what she had by the will, and was eighty-four years of age."

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R. Finch, in his evidence, stated, that "a day or two after the execution of the will, the testator told the deponent that he had a residue undisposed of, and expressed a wish to know how it would go if undisposed of, saying he wished to establish a charitable foundation, and to give something to the *Radcliffe* Infirmary. By his desire the deponent went to the plaintiff, to inform her of what the testator had done for her, and to offer 2,000*l.*, 3,000*l.*, 4,000*l.*, or any sum she pleased in addition, which offer she refused, saying she was perfectly satisfied with what she had, and that any increase would only be a burthen to her; and the testator told the deponent that she had before given him personally the same refusal. A few days after, the deponent was informed by the testator, that he had been to *Thomas Walker*, to know to whom the residue would go if undisposed of; and that *Thomas Walker* had cleared up his doubts, and that the residue of his personal estate would go to his executrix; and then added, 'that is your sister;' which the deponent did not know before. A day or two after, the deponent called upon the testator, and found him with pen and ink, as if preparing to write; and that the defendant, coming in, said to him, 'I am afraid you have not written, as you said you would;' to which the testator answered, 'Poo, damn it, the less I do, the better it will be for you.' The

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deponent was present, with Dr. *Chapman* and *Thomas Walker*, at the opening of the will; and the latter being asked, who would have the surplus, said, the defendant, as executrix, except the freehold, which would go to the heir-at-law." Dr. *Chapman* confirmed the last part of *Finch's* evidence, and proved, that in the conversation at the opening of the will, *Thomas Walker* said, he did not know the *Finch's* were so nearly related to the testator till lately, when, upon his observing how handsomely the testator had done for that family, he said, he did not know whether they were not as nearly related to him as any, except his sister.

The question was, whether the plaintiff, as sole next of kin, or the defendant, as sole executrix, was entitled to the residue? *Buller, J.*, after expressing his opinion, that if the case stood upon the will, he should have no doubt that the residue belonged to the next of kin, and not to the executrix, the different provisions in favour of the latter affording a violent presumption that the testator intended nothing more, observed, upon the subject of admitting parol evidence, that if the question were new he should reject it, but that he could not overturn what so many cases had established. That the Court of Equity had advanced by progressive steps in the admission of parol evidence, beginning with cases of fraud; and lastly, having admitted it in favour of the executor, they were obliged, upon a principle of common justice, to admit it on the other side also; and, therefore, by degrees it had happened, that in some cases a written will had been explained away by loose and vague parol evidence. Upon the effect of the parol evidence, Mr. Justice *Buller* said: "The executrix, who, as is rightly said, may begin with parol evidence (for the other party must rest upon the will, unless she chooses to go into parol), has examined two witnesses. *Finch* states many general conversations; but particularly tells us, that within a day or two after making the will, the testator told him he had a residue undisposed of. Did he believe then that he had given it to the defendant, or did he intend to do so? It is impossible he could then have thought she was entitled to it as by his gift, for he expressly said he had not disposed of it, and then wished to know how it would go if not disposed of, and talked of another intention, viz., of establishing a charity, and sent that message to his sister; and at a subsequent period said to *Finch*, the witness, that he had been at *Walker's* to ask to whom it would go. So *Croft* says; and that though she would have the residue, he had not given her as

much as she deserved. The utmost extent of this is, that some body told him afterwards that it would go to the executrix. The evidence of *Croft*, as to his advice to the testator, is very loose and unsatisfactory. I wish he had told us the very words he used; and I cannot help supposing, as he was bred to the Bar, that he advised him to make her residuary legatee, and that he told him how he was to give it, so as to enable her to take without pointing out in the will the amount of her fortune, and did not leave him to find out how he was to do that. If he did so, it appears that the testator did not follow his advice, as he said he would, but that of others. But, says he, 'the testator did some time after write to me that he had followed my advice, and taken care that she should *have the residue, and not be made a prey of*; or in these terms, that she should *not be made a prey of*.' The expressions are very different; and when he cannot say which phrase was used, I am not at liberty to suppose it was the strongest, when the latter phrase is applicable to the conversation between them: for, by his evidence, the great object was to provide for her, so that no person should be induced to marry her on account of her property, and by giving the principal part in that limited way, he was taking that caution which he mentions to *Croft*. It appears also, from *Croft's* evidence, that the intention to give the surplus one way or other was not a formed design of the testator at the moment of making the will, for afterwards, in *March*, the testator told him, 'he was not satisfied with his will, though he hoped others would be, and that he was much troubled about the residue.' The question was, what would become of it if he did not give it? Where he says, that all the real undisposed of would go to his sister, and all the personal to his executrix, he again treats that part of his property as undisposed of; and then it follows, pretty much of course, that his next of kin must have it. Then consider the evidence for the plaintiff. The two *Walker's* were men of business; to them he applies, not to the witnesses for the defendant, to know how he shall dispose of his property. One swears he told him, upon receiving instructions for the will, and when it was executed, that the surplus was not disposed of; and, therefore, it is clear he did not mean it should go either to one or the other, but that he meant to dispose of it himself by a codicil; and it is material, as was observed by Mr. *Mansfield*, that in this case there is something more than parol evidence only, *viz.*, the sketch of the codicil found wrapped up with the will. Therefore the evidence for the plaintiff is much stronger; first,

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on account of the relation between the defendant and one of her principal witnesses; next, it is clear from *Thomas Walker's* evidence, that he intended at the time to give the remainder to different objects, and talked of other relations as near to him as those provided for by the will; and also said, he had provided for all the grand objects of his bounty by his will, and must defer the rest to another opportunity, which is strong to show he did not mean they should take more than was expressly given. Therefore, even upon the parol evidence, it is in favour of the plaintiff, and no intention is made out to give it to the executrix; and so either way, upon the will or the evidence, the plaintiff is entitled as next of kin. Therefore there must be an account; but the costs must come out of the surplus, for, giving that to the plaintiff, I cannot give her the costs." The cause was afterwards reheard by Lord *Loughborough*, C., who affirmed the decree (e).

Clennell v. Lewthwaite.

The cases of *Clennell v. Lewthwaite*, and *Thornton v. Tracy* (f), were independent of each other, but involving the same question; and being brought forward under similar circumstances, they were considered and decided together, and the general observations of the Court were applied to both. The former arose upon the will of *John Lewthwaite*, dated *October 30th, 1780*, commencing thus: "I, *John Lewthwaite*, of *Whitehaven*, in the county of *Cumberland*, gentleman, being willing and mindful to dispose of my worldly estate, do make this my last will and testament in manner following: As touching the worldly estate, wherewith it hath pleased God to bless me in this life." The testator then, among other dispositions, devised to *John Lewthwaite*, of the island of *Dominica*, and his heirs, his freehold messuage and tenement at *Kirksanton*, in the said county of *Cumberland*; and then gave to Mr. *William Lewthwaite*, of *Broadgate*, in the said county, 1,000*l.*, and appointed the said *William Lewthwaite*, and his heirs, executors of that his last will and testament. The testator died in *October, 1790*. His wife and only son both died before he made his will. *John Lewthwaite*, the devisee of the real estate, died in the life of the testator, in consequence of which, *William*, the executor, was also heir-at-law. After the debts, &c., were paid, the personal estate afforded a surplus of about 70,000*l.* The bill was filed by several first cousins of the testator, to have the residue distributed among the next of kin.

(e) 2 Ves. jun. 78.

(f) 2 Ves. jun. 465.

The executor went into parol evidence of the testator's intention in his favour. *John Dixon* deposed, that "the testator for the last ten years, on account of his infirmities, employed the defendant to assist him in managing his affairs, and seldom transacted any business without consulting him. In 1782, the deponent went to the testator to endeavour to persuade him to accept a conveyance of the equity of redemption of an estate, upon which he had a mortgage, with respect to which there was some dispute. The testator said his advice was good, but he must excuse his making any answer till he had seen his relation, *William Lewthwaite*, as he would leave it to his choice whether he would have it land or money. The deponent frequently assisted the testator in examining his banker's accounts, and on one of those occasions observed to him, that his fortune in the funds was accumulating very fast, and he hoped he had settled his affairs: the testator answered he had, much to his satisfaction; that all he had was to go to *Broadgate*. This conversation happened some time after the death of the testator's wife and son, in 1783 or 1784, and at that time the defendant lived at *Broadgate*. The testator complained to the deponent, that *Lawson*, one of the plaintiffs, had used him very ill, by applying to him as a trustee in the will of Sir *W. Lawson* to consent to an application to Parliament to dock the entail. There was a great shyness between the *Lawson* family and the testator to his death. The testator informed the deponent, that *Lawson's* son had called upon him and that he scarcely knew him: the deponent expressing his surprise that he did not know so near a relation as Mr. *Lawson*, who might possibly expect to come in for some part of his fortune, he answered, it was then too late."

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Isabella Allison, a servant of the testator, deposed, that, after the death of his son, his wife pressed him to make a will; and on that subject he frequently declared to his wife, that he held it good to keep the name up in the family. The deponent never heard him name any other relations of the *Lewthwaite's* but the family at *Broadgate*; and once he received a letter from a person of that name at *Chester*, claiming to be his relation, upon which he was very angry, and said he had no such relation there. There was no connection between the testator and any of the persons claiming as his next of kin.

Henry Bowman, an attorney, deposed, that upon the 16th of *November*, 1786, he went to take an abstract of a mortgage which the testator had, in order to prepare an assignment, and with great difficulty prevailed upon the testator to look for and let him

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have the deed, as he declared he did not like to do any business without the assistance of his relation, *William Lewthwaite*, who had the management of all his matters. On the 22nd of the same month he went to have the assignment executed; and in the course of conversation, asked the testator if *Lawson*, the plaintiff, was not his next of kin, and would not get great part of his personal estate; the testator replied, with some earnestness, "No, the bulk, or most part of my personal estate, will go to my relation, Mr. *Lewthwaite*, of *Broadgate*."

Mary Deane deposed, that she had heard the testator say, his father was brought up at *Broadgate*, and it was the family home of the *Lewthwaite*'s; and that from the death of Sir *W. Lawson* he had dropped all connection with that family, having a dislike to his brother, Sir *Gilfrid*, the plaintiff.

Ann Rotherie, a servant of the testator, deposed, that after the death of his son, he sent a favourite greyhound, upon which he set a great value, to be taken care of by the defendant, who, he said, he thought would do it best. After 1780, in a conversation with him respecting his intention to sell a pew in a chapel, she said she was afraid he was doing wrong, as she thought it would, after his death, belong to Mrs. *Ellison*, his wife's niece; he answered, it was his own property, and Mrs. *Ellison* should not have it, for he had made his will, and given all his property to the defendant, except a few legacies; and that he had given 1,000*l.* to Mrs. *Postlethwaite*, because she had a family, and was more needy than the other legatees; and that he had given 500*l.* each to Mrs. *Hunter* and Mrs. *Agnes Lewthwaite*, the defendant's sisters. The testator would not listen to the deponent's entreaties in favour of Mrs. *Ellison*, but said, he had a right to do as he thought fit with his own; and he would never alter what he had done. She frequently heard him say, since the year 1780, down to within three months of his death, that neither Sir *Gilfrid Lawson*, the plaintiff, nor any of the *Lawson* family, should ever have a penny of his money or effects. There was no connection between him and that family, or the other plaintiffs. The plaintiff, *Sarah Cockburne*, applied to the testator for relief, saying, her brother, the plaintiff, *Lawson*, had refused to relieve her; the testator refused to assist her, and said, she was to expect nothing from him. The deponent heard frequent declarations from the testator, during the last six or seven years of his life, that he had given the greatest part of his fortune to the defendant. This witness confirmed the deposition as to the letter to the testator, claiming kindred with him. *Eleanor Postlethwaite*, and other

witnesses, spoke generally to the testator's regard for, and intimacy with, the defendant and his family. The answer admitted, that about two years before the testator's death, the defendant, in looking among some papers, discovered the will; and about *August*, 1790, he shewed it to his solicitor, and took an opinion of counsel as to his title to the residue. The opinion was in favour of his title to the residue, but that it was a very doubtful case; and that he might give parol evidence of the testator's declarations to explain his intention.

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The other cause arose upon the following will of *Ann Loud*, in which the testatrix gave *James Tracy* 300*l.*; and, among other dispositions, gave her sister *Eleanor* (one of the plaintiffs) one shilling; to *Esther Thornton*, another of her sisters, and one of the plaintiffs, an annuity of 5*l.*; and to *Mary* and *Elizabeth Kingston*, her two nieces (two of the plaintiffs), 10*l.* each. The testatrix also gave her wearing apparel equally between her sisters. To *Esther Loud*, another of the testatrix's sisters, one shilling; and she appointed *James Tracy* her "whole and sole executor." This will was drawn by *Tracy*, the executor, and was executed by the testatrix on the 21st of *March*, 1791; and on the same day, very soon afterwards, she died. The bill was filed against the executor by the testatrix's two sisters and two nieces, to have the residue distributed among the next of kin. *Elizabeth Loud*, another of the sisters of the testatrix, and mother of the executor's wife, was a defendant. The executor, by his answer, said, that this legacy was intended for his wife; but he, not knowing whether a married woman could take a legacy, thought it better to put it down in his own name. He went into parol evidence. *Mary Lamble* deposed, that she frequently heard the testatrix declare, she had been all her life providing for her sister, *Esther Thornton*, and her family, and therefore designed to leave her but a trifle by her will; and that she would not leave a farthing to her sister, *Eleanor Stone*, with whom she had lived upon very bad terms; and that she would leave the greatest part of her property to the defendant and his wife. When she was giving instructions for her will, she asked *Elizabeth Tracy*, the defendant's wife, what she should give her; she answered, "What you please, aunt;" the testatrix said, "300*l.*" The defendant asked the testatrix what she would give her nephew, *John Thornton*; she replied, "The *Portlemouth* estate;" and directed that he should pay thereout to his mother an annuity of 5*l.* The defendant then asked, whether she would give *Samuel Thornton Small's* estate; she replied, "No; he hath had enough already;

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give him one shilling." The defendant asked what she would give her brother's children at *Dittisham*, meaning the plaintiffs, *Mary Elliot* and *Elizabeth Kingston*; she replied, "Stop:" and after some little time said, "5*l.* each." The defendant said, she could afford them more; she immediately answered, "I am afraid I shall give away too much from you;" he said he had enough, and asked if he should give them 10*l.* each; she desired him to do as he pleased, and he accordingly put down 10*l.* to each of them. She then ordered him to put down 5*l.* each to her nephews, *Robert* and *Crawford Thornton*. He asked her what she would give her sister, *Eleanor Stone*; she replied, "Nothing:" but after a little hesitation, said, "You must give her a shilling, or else it will not stand in law." She then directed him to put down one shilling to her sister, *Elizabeth Loud*, and said to him and his wife, "You maintain your mother." *Elizabeth Tracy* answered, "Yes, aunt." He then asked, whom she would have for the executor; she answered, "You, *James*." A little before her death, in conversation with the defendant and his wife about the rent of one of her estates, which she thought he was going to let at an under value, she told him he should endeavour to make the most of it; as the more he made of it, the better it would be for himself. *Sarah Hewitt* deposed, that the testatrix declared she designed to leave her sister, *Esther Thornton*, an annuity of 5*l.* out of the *Portlemouth* estate; and that she would leave her sister, *Eleanor Stone*, but one shilling, as she had enough already. This witness confirmed the last, as to what passed at the making of the will. *John Thornton* deposed, that the testatrix frequently declared, her sister, *Eleanor Stone*, should never be the better for her, because she used her so ill. These witnesses and others deposed, that the defendant's wife was the favourite niece of the testatrix; that she never transacted any business without the assistance and advice of her and her husband; and had said, they were the only friends she had left.

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There was no evidence for the next of kin in either cause. Lord *Alvanley*, M. R., after reprobating the admission of parol evidence, and going through the cases before stated, observed, that the rule was clearly established, that the executor should have the residue, unless there was a strong and violent presumption to the contrary; that a legacy to him afforded that presumption: but that it was not so strong, to take away his legal right, as to deprive him of the opportunity of proving by parol evidence, that the testator did intend that he should have it. Therefore, he was bound to admit it; for those cases clearly

established it. Upon the effect of the evidence his Lordship said: "As to the first of these causes, a very extraordinary part of the will, and which gives great strength and credibility to the evidence, is the addition of the words, 'and his heirs.' Great stress was laid upon them. Perhaps that alone is too slight: but, coupled with the evidence, can any one doubt, the testator had some meaning, and had an idea of a succession to personal, something like the succession to real estate. No matter whether it could take effect. It is enough that he intended to give it beneficially, especially if that intention is corroborated by parol evidence. He had some idea of giving something to the heirs. He could not mean them to take only a trust: men of whom he knew nothing. He meant to make them his *hæredes facti* as to his personal. The step taken upon discovering the will, is rather a suspicious circumstance. Upon the opinion, I suppose, he was to determine, whether his relation should make his will more explicit. I lay very little stress upon loose general declarations of regard: but the evidence is positive, that the testator intended he should have the surplus, when he meant to make him executor. If, therefore, it is admissible, I must ask myself, whether I am satisfied he did intend the executor to have the residue: I have no difficulty in saying, that this evidence, coupled with the will and the expression 'his heirs,' shews it; and I am bound to admit it, though not arising at the time of making the will, and must therefore dismiss the bill."

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Upon the other case his Lordship observed: "This cause is in some degree different from the other. The will is very short: but the expressions are not immaterial. The expression 'whole and sole executor' occurs in one of the cases I have commented on. The gift of one shilling to her sister *Eleanor* is very material. I do not say even that (which is, however, different from giving substantial legacies), would be enough; but, coupled with the evidence, it is strong; for it must have some object: and when the evidence is read, though it is said to be slight, yet taken with the will, it is strong. It is no uncommon thing for people who are not lawyers, to consider making a man executor, like making him heir; and the words 'whole and sole' must have some meaning. Can it be only that he was to have the trust of disposing of her property. It conveys some strong idea of something beneficial, but that alone would not do. In considering the evidence, I lay out of the case declarations of intention as to what she would do. It is not necessary to comment particularly upon it: it is sufficient to say, that upon a full revision of all the

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authorities, and the two cases in the House of Lords, I am bound to lay this down, that a legacy shall exclude an executor, unless evidence can be given to rebut that presumption arising from it; that parol evidence may be given for that purpose; and that I am satisfied with the evidence which has been given. I must, therefore, decree for the defendants in both these causes, whatever may be my private opinion, upon the point of admitting the evidence. As to *Clennell v. Lewthwaite*, if the next of kin are not legatees, let the bill be dismissed without costs. In *Thornton v. Tracy*, take the usual accounts of the legacies due to the plaintiffs, and declare that the residue belongs to the defendant."

In *Clennell v. Lewthwaite*, the plaintiffs appealed (g) from the decree at the *Rolls*, upon which occasion Lord *Loughborough*, C., observed, "Admitting then that a legacy to the executor, unless there are some other circumstances to countervail it, will turn the surplus into a trust for the next of kin, and the other proposition, that parol evidence may be admitted to shew, that it is not the true construction upon that will, the only question a Judge can ask himself, when it comes before him upon parol evidence is, whether the effect of the evidence upon his mind, is to satisfy him that the executor ought to be left in full possession of that right, the nomination as executor gives him by law. It is very natural that the counsel for the appellant should insist upon separating it: but that is not the way to judge of it; I am to take the whole, *juncta juvant*. The will itself is part of the case. I cannot shut out the will, and consider the evidence; or shut out the evidence, and consider the will. I must take the whole together; and it has happened in most of the cases, that the parol evidence has had a considerable degree of application given to it, from the terms in which the will was drawn. In this case the will was made at a very advanced period of life, but when, it appears from all the evidence, he was much in possession of his understanding. It is not in the ordinary terms in which a man of business would express it. Words are used undoubtedly not in their common meaning, and in a way, that it is difficult to know what he meant, the words not being applicable to the subject. The circumstances of the family were these. This son, an only child, who had lived to the age of forty-two, and, during whose life, it does not appear he ever thought of making a will, was dead; his wife was also dead. He then makes his will. No family is noticed in it, but the family of the defendant. How is he appointed executor? The testator

(g) 2 Ves. jun. 644, 648.

had got into the habit of using the words 'heirs,' and 'for ever:' and he appoints the defendant and his heirs executors. They are very unapt words, and such as no one, who knew their just application, would have used: but I cannot say it is so absolutely dark, and blank nonsense, that nothing is to be inferred from it. It is difficult to resist the inference, that in his idea it was a mode of describing the complete and entire interest he meant they should take in the interests given. Though a slight circumstance, yet it is not wholly to be laid out of the case, that in the beginning of the will he sets out with a declaration of intention to dispose of *all* his property: what he does dispose of is a very inconsiderable part. His wife and only child being dead, his bounty is pointed to the *Lewthwaite* family at *Broadgate*. The real estate he gives to the eldest of them who was abroad, but with a limited interest; and he gives these legacies. Then I am to look at the parol evidence. By that he seems to have been very unwilling to give anything in his life. He had relations on the part of his mother. Occasions had drawn him to know something of them, but not favourably. Little account is given of his having any intercourse, good or bad, with the others: but with that family, the *Lawson's* who were cousins germans once removed, he certainly had. A habit had continued of reposing his general affairs upon the defendant. In his material transactions he consulted him. That is general evidence; and if it rested there, would be scarcely sufficient for a jury: but then the particular instances in *Dixon's*, *Bowman's*, and *Rotherie's* evidence, are so extremely strong and pointed, that there is hardly a degree of doubt; for the effect of all the evidence is, not talking of an intention in favour of *William Lewthwaite*, but of what he had done. He employs him in his business, because he had done something in his favour. In the conversation with *Dixon* about the mortgage, he declines entering upon it, and adds the reason with reference to the choice of the defendant. Upon another occasion, when settling his banker's books, *Dixon's* curiosity urges him to that inquiry; an apology was made, and a civil and kind answer given. It is the conversation of a man of a firm mind and intelligent understanding. He then gives a full answer to the inquiry, not that he would settle his affairs, but that he had settled them, and that all he had was to go to *Broadgate*. It is said, that might refer to a future act: but it follows upon his having said, he had settled his affairs; and then it is the result of that settlement. *Bowman's* conversation with him arises upon an application for

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a little more money upon the mortgage he had from Mrs. *Postlethwaite*: first, the sum of twenty guineas is begged, then ten: finding him inexorable upon the head of relief, *Bowman* says a little peevishly, that Sir *Gilfrid Lawson* is his next of kin, and will get all his money: he answers quickly upon that, "No: the bulk, or most part of my personal estate will go to my relation Mr. *Lewthwaite*, of *Broadgate*." The evidence of *Rotherie* is more particular still. Having been servant to his wife, continuing his housekeeper, and, in that capacity and at his time of life, being much about him, and having a great desire to promote the interest of a niece of her old mistress, she takes an opportunity to try to get him into a disclosure as to the disposition of his fortune. It was very natural and proper that he should have given that niece something: but he cuts the witness short upon it, saying, the pew was his own. Then he tells her what legacies he had given. She presses her application in behalf of his wife's niece: but he refuses, saying, he would never alter what he *had* done. To all these persons, therefore, he distinctly speaks of having made an absolute, definitive, and total disposition; and distinctly adds, that the object is *William Lewthwaite*, of *Broadgate*. Upon this evidence applied to such a will, the will itself perhaps containing some circumstances of doubt upon the rule, (but I shall not take it so: I will take the rule to be as laid down for the plaintiffs), there can be no doubt; and I feel a perfect satisfaction, that in affirming the decree, I am decreeing exactly according to the intention, as expressed upon this will, which is brought before me to be construed."

In *Walton v. Walton* (*h*), General *Brome* left at his death a copy of an instrument, entitled, "Proposals of marriage articles by Major General *Brome* to Mr. *Marnell*." In this instrument he agreed, amongst other things, to give his daughter *Louisa* 1,700*l.*, to be paid to her as soon as possible after his decease, and to allow her an annuity of 100*l.* during his life, if she so long lived, &c. Under the copy of these proposals, the General wrote a memorandum, wherein he confirmed the articles, and concluded in the following words: "And I do, in consideration of my said daughter's marriage with the said *Richard Marnell*, hereby order and direct, that all my property and effects shall be vested in him the said *Richard Marnell*, preferable to any executor or administrator, upon and after my decease, for all and every the purposes in my said agreement expressed or

intended." The General left a son and Mrs. *Marnell*, his only children, and three grandchildren by a deceased son. *Marnell* obtained probate. A bill was filed by the only surviving son of General *Brome* praying a distribution of the residue among the next of kin. The question was, whether *Marnell* was trustee for the next of kin. For the defendants *Marnell* and his wife, parol evidence was produced. The depositions of *Wright*, a confidential servant, stated declarations by General *Brome*, that he had given up to *Marnell* mortgage deeds and securities for the sole use of him and his wife, after his (the General's) death; that the General had frequently read the testamentary paper to the deponent, and declared that he intended by it that *Marnell* and his wife should have the whole property for their sole use after his death, and that it would be a legacy to him; that he had delivered it, in deponent's presence, to *Marnell*, desiring him to make the most of it; and, in allusion to arrears of the annuity the General had in the articles agreed to pay, the General had said that he was determined to make every compensation in his power; and had, therefore, by the paper given all his property to them, in preference to all the world. The deponent also stated general declarations of resentment against the plaintiff, and a determination to do nothing more for him, or the grandchildren. Sir *William Grant* was of opinion, that the parol evidence could not be rejected, and that the executor had thereby made out his right to the residue. In the course of his judgment, his Honor observed, "the parol evidence in this case is just of the same nature with that given in *Lake v. Lake* (i), *Clennell v. Lewthwaite* (k); and that class of cases: viz. declarations by the testator after the execution of the will, of what he intended, and understood himself to have done by his will; and those declarations are full and distinct in favour of *Marnell*. It is, no doubt, an objection to such evidence, that the Court has not adopted any mode of obtaining the result of it, in the way in which its truth and credit could be best examined and sifted. There is no instance of an issue directed to determine that question between the executor and the next of kin. But it is too late now to contend upon that, or any other ground, that such evidence ought to be rejected. There is nothing upon the face of these depositions authorizing me to disbelieve them; and, assuming the evidence to be true, though

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(i) 1 Wilson, 813; Amb. 126, *supra*.

(k) *Ubi supra*.

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there is but a single witness, I cannot, upon any principle in this Court refuse to act upon it."

In *Langham v. Sanford* (1), Sir John Chichester gave to the Rev. John Sanford 10,000*l.* sterling, with the furniture in his house in *Upper Grosvenor-street*, and at *Wickham* (plate only excepted): and after giving several legacies and annuities, concluded thus: "I appoint the aforementioned John Sanford, clerk, my executor." The testator made three codicils, two only giving legacies; in the third he mentioned he had given directions to Mr. Harman to prepare a will disposing of his paternal and maternal estates; but, lest he should die before it was ready, he gave the timber of his wife's estate to G. C. Oxenden. By another codicil, he gave a house in *Seymour Place*, which he had agreed to purchase, to John Sanford. Upon the bill of the next of kin claiming the residue, Sanford, the executor, produced evidence. Scott (among other things) deposed, that, at the testator's suggestion, he had prepared the preamble of a will, and written the bequests according to the dictation of the testator. Upon the deponent's suggesting the propriety of naming an executor, the testator named Sanford, and the deponent, if he had no objection, and which the deponent declined: that, on the day after, the deponent filled up the blanks in the draft prepared by the solicitor under the testator's direction, and the next day the papers were delivered to the solicitor for the purpose of incorporating the legacies, and disposition of the personal property in the draft will of the real estate. Hole, another witness, deposed, among other things, that he said to the testator he would tell him, for perhaps he did not know, to whom his personal estate would belong upon his dying intestate; and accordingly named all his next of kin, nine in number; upon which the testator appeared much startled at some of the names; and upon one, clearly indicated dislike. The testator having suggested the propriety of destroying a paper drawn by Scott, the deponent said it would be rendered useless by the execution of the will, to be prepared from the paper the deponent had then written: and that the legacies in that paper, with many others he might choose to add, together with the names of executors and residuary legatees, might be added in his new intended will. Ann E. C. Sanford, another witness, whose testimony was corroborated by her sister Jane Sanford, deposed, that the testator had expressed disappointment at not executing his will, and that it was a weight upon his mind,

and asked deponent if she knew who were his next of kin, and would come in for all his personals, if he should not dispose of them: that, upon a subsequent occasion, the deponent remonstrating with the testator upon leaving *Wickham* without signing his will, the testator said it was of no consequence, for he had settled his personals, and cared for nothing else. *Hutton*, another witness, deposed, that he had had various conversations with the testator relative to his personal property, and which the testator said he had disposed of, having given legacies to each of his next of kin, as they might have been disappointed by his making a will; but that the testator had made no other declaration in their favour, nor respecting the distribution of his residuary personal estate.

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The next of kin objected to the admission of the parol evidence, insisting, that the testamentary instruments amounted to declaration plain against the executor. Upon which, Sir *William Grant*, M. R., observed, "To raise the objection to the admission of the evidence, it must be such as tends to contradict the will. It does not appear that this will does unequivocally convey, upon the face of it, the intention to exclude the executor from the residue. It is not sufficient, that it furnishes argument in favour of that intention. A legacy to an executor for his pains and labour is a declaration, that he is to take the office as an office of burthen, and is not to have the benefit of the estate. The admission of evidence, therefore, of an intention, that he should take the beneficial interest, would be to contradict the will; but in this case, according to the strict letter, the testator does not say, the executor is not to have the plate, but merely that he is not to have the plate as part of the furniture. That is the amount of the exception. However, therefore, it may furnish an argument, it does not necessarily imply that the testator might not intend that his executor should take the plate, if not wanted for the other purposes of the will, as part of the residuary estate." The evidence was accordingly admitted, and upon a subsequent day his Honor expressed his opinion, that, it being admitted that upon the face of the testamentary papers the executor stood excluded from the residue by the particular bequest in his favour, the executor had a right (*m*) to resort to parol evidence to rebut the legal presumption from that circumstance; but that, upon the whole, the evidence did not establish, but seemed to disprove, any intention to give the residue to the executor: and

(*m*) See also Lord *Eldon's* observations, 19 Ves. 643, 645.

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his Honor declared the plaintiffs entitled to the decree prayed. In the course of his judgment, he observed upon the effect of the evidence, that "in all the cases of this kind that I recollect, there has been evidence of declarations of direct intention in favour of the person appointed executor. Here it is left to be collected by inference and deduction from such declarations as these, that he had disposed of his personal property, or had settled all his personals; which it is said, he had not done in any other way than by the appointment of an executor; and, therefore, he must have conceived himself to have made a disposition in favour of his executor by such appointment." His Honor seemed to think, that from the time of *Hole's* evidence the testator had resolved to make such a disposition of his residue as should exclude the claim of his next of kin; but that he could not collect from the evidence, that he meant to attain that object, or conceived it to be attainable by any other mode, than that pointed out by the sketch, namely, an express disposition of the residue. That the testator's proposition to *Scott* to be one of the executors, with a qualification, if he had no objection to it, appeared strongly to shew that the testator had no conception that the nomination of the executor would include a disposition of the residue; and there was no reason to believe the testator ever had it in contemplation to appoint *Scott* his residuary legatee (*n*). With respect to the circumstance of the legacy to *Sanford*, being given before the testator conceived the design of appointing him executor, his Honor thought that it shewed the testator did not give the legacy to him in the character of executor, and, therefore, not intended for his care and trouble; but that it shewed no more. Another circumstance was, that the draft made in preparation of the will contained a residuary bequest, with the names of the residuary legatees, inserted by the direction of the testator; from which his Honor thought it decisive, as he could not believe that the testator could have conceived himself the day before to have made a complete disposition of the residue, and given the whole to *Sanford*, by appointing him his executor (*o*).

The decree of the Master of the Rolls in the last case was confirmed upon appeal (*p*) by Lord *Eldon*, who, in the conclusion

(*n*) 19 Ves. 647. Where Lord *Eldon* concurs in this argument.

(*o*) Sir *William Grant* observed, that in *Nourse v. Finch*, *ubi supra*, a

similar circumstance was held conclusive of the intention.

(*p*) 19 Ves. 641.

of his judgment, observed, "On the whole my opinion is, that, attending to what passed as to this testator's great scheme of a will actually prepared, the appointment of a meeting to settle that more comprehensive will at the time this was executed, and attending to what passed at the time the defendant was appointed executor, he cannot take the residue. I regret it; thinking, that this rule of law does in this instance, as it has in many others, disappoint the intention; but I cannot get out of the rule; and the evidence, fairly considered, instead of rebutting, confirms the presumption. My judgment is, therefore, that this decision is right."

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To the last case we may add the more recent determination of *Gladding v. Yapp* (q). There the testator, after giving a house and lands with the household furniture, stocks, and implements of husbandry, (except one mare for the use of the testator's sister *Catherine Yapp*), to *Thomas Harris*, absolutely, added, "But my sister *Catherine Yapp* is to and shall have her free living in the house, or any part for her use as long as she lives, with the use of any household furniture she likes." After various bequests, the testator concluded his will thus: "Now I constitute and appoint my sister *Catherine Yapp* to be my sole executrix, and *James Parlour* shall have power jointly to call up any monies due upon bonds, notes, or other securities, to discharge my funeral expenses and debts and legacies, as soon as they shall think meet after my decease, keeping a proper account of the same; and I give unto *James Parlour*, my trustee, the sum of 50*l.* for his trouble, to be paid out of my monies that are due to me at my decease." The will was proved by *Catherine Yapp*. The personal estate, which after payment of debts was considerable, was claimed by the next of kin. The defendant demurred to the bill for want of equity; but the demurrer was overruled by Sir *John Leach*, V. C., upon the ground, that the direction to keep accounts *primâ facie* imported a trust. Evidence was adduced by the executor of *Catherine Yapp*; and *James Parlour* the legatee deposed that, four days before making the will, the testator told deponent he meant to make a will, and give the surplus to his sister *Catherine Yapp*, and that he would appoint her his executor: and that, some days after, the deponent wrote out the testator's will, and by his directions made some alterations; and, upon being asked what he meant to give the *Yapp's* (meaning *Catherine Yapp's* two sons),

(q) 5 Mad. 56.

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the testator said he would not leave them anything, as he should appoint *Kate* (meaning their mother) his executor, and she might do what she would with it. The deponent also swore, that the testator said he (the deponent) would have a good deal of trouble as his (the testator's) sister, was no scholar, and only a woman, and that the deponent was to keep the account of the property for her. Sir *John Leach*, V. C., said parol evidence was not admissible to contradict the will, and if the will contain express declarations that the executor is to be a trustee, evidence cannot be received against the effect of that declaration; but if there be no such declaration of trust in the will, and only circumstances, which afford inference or presumption of trust in the executor, there parol evidence is admissible to answer that inference or presumption. His Honor observed, that it appeared to him, on the argument of the demurrer, that the words relating to the keeping accounts (*r*) afforded an inference that the executrix was not to take the residue beneficially; for otherwise, no account on her part was necessary; but that the evidence explained that passage in the will; since it appeared there was no reason for the testator naming *Parlour* as a trustee only, and his sister executrix, as they were to have the same powers, but because he meant the latter to take the residue beneficially.

It appears to be the language of some of the cases stated in the present section, that proof of such declarations of the testator as were made at the time of making his will, was alone to be admitted; and that all conversations at other times, in which any thing passed between the testator and others relative to his intentions in respect of his executors or next of kin, were to be rejected. Such certainly were the opinions of Lord *Macclesfield*, in the *Duke of Rutland v. The Duchess of Rutland* (*s*), of Lord *Kenyon* in *Thomas v. Thomas* (*t*), and of *Buller*, J., in *Nourse v. Finch* (*u*). But, however sound the reasoning may have been upon which the opinions of those Judges were founded, at this day they are not law. Subsequent cases have taken away their force; and it is now settled, that all conversations and declarations of testators, in regard to their wills upon the subject of rebutting equities or implied trusts, must be admitted under proper qualifications. In *Trimmer v. Bayne* (*w*), Lord *Eldon*

(*r*) Before stated as the conclusion of the will.

(*s*) 2 P. Wms. 210, *supra*, p. 1756.

(*t*) 6 Term Rep. 671, *supra*, p. 177.

(*u*) 1 Ves. jun. 344, *supra*, p. 1760.

(*w*) 7 Ves. 518.

fully considered the subject, and in the course of his able judgment, thus expressed himself: "I fear there is no possibility of saying, *parol* declarations, both previous and subsequent, are not admissible, though Lord *Coke* would hardly have been brought to let them in, as well as declarations at the time. But there is very great difference, as also upon these marriage treaties, upon the point, whether they are all alike weighty and efficacious. A declaration at the time of making the will is of more consequence than one afterwards; and a declaration after the will, as to what he had done (I am speaking as to the time merely), is entitled to more credit than one before the will, as to what he intended to do: for that intention may very well be altered: but he knows what he has done: and is much more likely to speak correctly as to that, than as to what he proposes to do. These *parol* declarations are all alike admissible, whether consisting of conversations with people who have nothing to do with it, people making impertinent inquiries, and drawing from him angry answers, or in whatever form, they are all evidence. But they are entitled to very different credit and weight, according to the time and circumstances."

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His Lordship made similar observations upon this subject in *Langham v. Sandford* (x), where he says, "It is unfortunate, but it is certainly settled, that declarations at the time of making the will, subsequent and previous to it, are all to be admitted: yet we know that what men state, as to their intentions, may be conformable to the purpose at the time, but not afterwards; and declarations by a testator, after having made his will, are frequently made for the purpose, not of fairly representing, but of misrepresenting, what he had done. The weight of authority belongs to that evidence, which is evidence of fact at the time, declarations with reference to the will then made, and conversations between the testator and the person making the will: both embodying in the paper the subject of those conversations between the one directing, and the other consequently doing, the act. Evidence of the other description, therefore, does not weigh much" (y).

2. We have before observed, that when a legacy is given to the executor, or there are other expressions in the will raising a presumption in favour of the next of kin against the legal right of the

2. Adduced by next of kin.

(x) 19 Ves. 649; see also 1 Turn. 7 Bing. 628; *Oldman v. Slater*, 3 68. Sim. 84.

(y) See also *Whitaker v. Tatham*,

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executor, the executor is allowed to produce evidence to rebut that presumption; so, on the other hand, the next of kin will be permitted, by adducing contrary testimony, to encounter that produced by the executor. The reader will find instances of this counter evidence in the cases of *Rachfield v. Careless* (y), and *Nourse v. Finch* (z), before stated, and to which he is referred.

It has been also noticed, that where a legacy is bequeathed to an executor, in such a manner as to be equivalent to a declaration of trust in favour of the next of kin, no parol evidence will be admitted on behalf of the executor to prove a different intention; as in instances where the testator gives a legacy to the executor for his "care and trouble" (a). On the other hand, parol evidence will not be allowed, on behalf of the next of kin, to deprive the executor of his legal right to the undisposed residue, where no legacy is given, nor any intention is to be collected from the will that he should be executor in trust.

Thus, in *Lady Osborne v. Villiers* (b), A., being possessed of a considerable personal estate, made his will; and thereby bequeathed several legacies, but gave none to his executor. The question was, whether parol evidence ought to be admitted to prove that the testator did not intend that the executor should have the residue of his personal estate, but that the same should go according to the Statute of Distributions: and it was held clearly that no such evidence could be admitted, for such admission would not be to allow evidence to oust an implication, but to *contradict the rule of law*, and what appeared upon the face of the will.

So also, in *White v. Williams* (c), before stated, unequal legacies were given to the executors, and the testator made no disposition of the residue of his personal estate; but left a blank between the last line of the will and the signature of his name. The next of kin claimed the residue, charging that the testator intended in the blank space to introduce a bequest of the residue, but was prevented by apoplexy, and they offered to produce parol evidence, but it was rejected, Sir *William Grant* being of opinion that he could not infer from the blank left that it was intended for the purpose of introducing a residuary clause, either to give it away from, or to the executors.

(y) 2 P. Wms. 158; *supra*, p. 1702.

(z) 1 Ves. jun. 344, *supra*, p. 1760;
see also per Lord *Eldon*, 19 Ves. 643.

(a) See *Rachfield v. Careless*, *ubi supra*; *Glennell v. Lewthwaite*, 2 Ves. jun. 465; *White v. Evans*, 4 Ves. 21,

supra, p. 1701; also 17 Ves. 443;
19 Ves. 643; 1 Turn. 68.

(b) 3 Bac. Abr. 71, ed. 1807;
Fol. ed. p. 426.

(c) 3 Ves. & Bea. 72, *supra*, p. 1736.

3. We close the present chapter with observing, that in many cases it happens that expressions are used by persons in their wills, affording ground for probable inferences that they intended the executors to be trustees for the next of kin; but if such expressions do not amount, in the judgment of the Court, to a plain and unequivocal declaration that the executors are to be considered as general trustees, they will be allowed to produce parol evidence, in support of their legal right to the undisposed residue.

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3. Where inference of intention in favour of next of kin doubtful.

This is illustrated in the case of *Lynn v. Beaver* (d), before stated.

There the executor had only a contingent reversionary interest; for, if he should die in the lifetime of his wife, he could take no share in the profits of the testator's trade. The executor brought parol evidence, proving declarations by the testator that he intended him to take the residue. The plaintiff's counsel objected to the evidence being read; but Lord *Eldon* admitted it. His Lordship, as before stated, entertained doubt whether a contingent reversionary interest would exclude the executor; but, assuming that it would, he was of opinion that, upon the evidence, the executor was entitled to the residue: and, in concluding his judgment, observed, "Taking it for granted, however, that this contingent reversionary interest would exclude the executor, there is nothing upon the face of the will to show that the executor was intended to take the office merely; all the cases have established that, under such circumstances, *parol* evidence is admissible. The question, therefore, is reduced to this; whether, supposing this contingent reversionary interest to be a good gift to bar the executor, I can say that the evidence is sufficient to rebut the presumption? The widow of the testator swears to what passed between her and the testator after making the will; that the testator, holding the will in his hand, stated what, in his judgment, was its effect; not, indeed, with any great accuracy, for, to do justice to the testator, it was out of the power of any man, living or dead, to state accurately what was the effect of the will; but, on one point, he was quite distinct, that he intended his executor to take his property. I am, therefore, of opinion, upon the whole, that this is a case in which the next of kin cannot raise the trust, and that the executor takes what is undisposed of by the will. On account of the great difficulty of construing this will, I think the fair thing is, that the costs of all parties should be paid out of the estate."

(d) 1 Turn. 63, *supra*, p. 1700.

CHAPTER XXV.

The Jurisdiction of the Courts in Legatory Matters.

THE Courts which have jurisdiction in testamentary matters are the Court of Chancery, the Ecclesiastical Courts, and some Courts Baron. The two last have exclusive jurisdiction in the probate of wills; the jurisdiction of the Courts Baron being founded on immemorial usage (*a*). The probate of testaments, and the consequent determination of matters arising out of them, belonged originally to the County Courts, in which the sheriff and bishop sat together prior to the Conquest (*b*). While these two Judges presided, no distinction was made in the determination of law and ecclesiastical causes, each Judge advising the other in questions more particularly within his province. After the accession of *William* the First, and the consequent dismemberment of the County Court, arising from the bishop being prohibited from sitting in judgment with the sheriff, the consideration of lay and ecclesiastical questions followed their respective Judges.

It cannot now be ascertained at what particular period, after this revolution in the business of the County Court, the Ecclesiastical or Bishop's Court first acquired a jurisdiction in testamentary matters, but it is agreed to have existed so early as the reign of *Henry* the First or *Henry* the Second, but not in exclusion of the common law (*c*).

Although the Ecclesiastical Courts have by length of time acquired the original jurisdiction *in rebus testamentariis*, Courts of Equity have nevertheless obtained a concurrent jurisdiction with them, in determinations upon personal bequests, as relief in those cases is generally dependent upon a discovery, and an account of assets. The executor also is frequently considered a trustee for the several legatees, and the Court of Equity never

(*a*) Office of Executor, 44. Where Wentworth mentions the Courts of the manors of Cowley and Caversham, in the county of Oxford; *Marriot v. Marriot*, Gilbert's Eq. R. 203, and see *Orphans of London case*,

5 Coke 73, b.

(*b*) Lamb. Sax. Laws, 64; see *Hensloe's case*, 9 Coke R. 37, b.

(*c*) Spelm. Orig. of prob. of Wills, 128; Glan. Lib. 7, ch. 6, 7.

refuses its jurisdiction in matters of trust. In some instances the Court of Chancery exercises a jurisdiction in exclusion of the Ecclesiastical Courts, inasmuch as the latter have not the means of affording effectual relief. As to the probate.

Cases have occurred in which Courts of Common Law have assumed jurisdiction of testamentary matters, and permitted actions to be brought for the recovery of legacies; but this only in particular instances, where by the assent of the executor, or the act of the legatee, the nature of his remedy is changed; for no action at law lies to enforce the payment of a general legacy. A more detailed consideration of this subject will be attempted under the following arrangement:

SECT. I. The jurisdiction of the Courts, with respect to the *probate*.

SECT. II. The Jurisdiction of the Courts, in regard to the *recovery* of the legacy.

- 1.—*In the Ecclesiastical Courts.*
- 2.—*In the Court of Chancery.*
- 3.—*In the Courts of Common Law.*

SECT. III. In regard to the *interpretation* of the gift.

- 1.—*In the Courts of Equity and Common Law.*
- 2.—*In the Ecclesiastical Courts.*

SECT. I. The Jurisdiction of the Courts, with respect to the *probate*.

This jurisdiction belongs exclusively to the Ecclesiastical Courts, and to those Courts Baron to whom it has belonged from time immemorial, and by them alone can the validity of a will, either of real or personal estate, be determined (*d*).

But the jurisdiction to determine whether a married woman has power to make an appointment in the nature of a will, appears to belong to the Temporal Courts (*dd*).

If the probate is merely produced, and nothing objected to it, it must be presumed to be good, and the Courts must proceed upon it; but if parties are dissatisfied with the probate, the Courts of Equity will give time (*e*) to dispute its validity, and As to the probate.

(*d*) 3 Meriv. 171; 7 Bro. P. C. 437. *Sheffield v. The Duchess of Buckinghamshire*, 1 Atk. 628, *infra*; also (*dd*) *Ex parte Tucker, Re Inman*, 1 Man. & Gr. 519. *Paine v. Stratton*, cited 2 Atk. 647; 3 Bro. Parl. Ca. 257; *Haverhall v. Harrison*, 7 Beav. 49. (*e*) See per Lord Hardwicke, in

As to the probate.

suspend their determination till it has had a trial in the proper Ecclesiastical Court or Court Baron, which alone can revoke it.

In *Archer v. Mosse* (*f*), *John Archer*, the plaintiff's uncle, while in perfect health, had made his will, and thereby given the plaintiff the greatest part of his personal estate, to the value of 5,000*l.*; but *B. Sandyman*, his maid servant, had prevailed upon him in his sickness, as was alleged, to make another will, and to marry her about a week before his death, when on his death bed, at six o'clock at night; though it was proved by two witnesses that she was a year before married to the defendant *Mosse*, and was then his wife, and that *Mosse* procured the license for the marriage of *Archer* and *Sandyman*; and that though they had set up a will dated a week before *Archer*'s death, by which *Sandyman* was made executrix, and all given to her, and that she had suppressed the former, under which the plaintiff claimed: yet as that will so set up by *Sandyman* was proved in the Prerogative Court, and she had made her will, and *Mosse* executor (though, in this case, there was as gross a practice proved as could possibly be in gaining the will by *Sandyman* from *Archer*, and that he was not *compas mentis* either when he made such will, or at the time of his pretended marriage with *Sandyman*, and that he knew in his health that she was married to *Mosse*), and the matter in question purely related to personal estate, the *Lord Chancellor* was of opinion, that while the probate stood the subject was not to be examined in Chancery; and though fraud was fully proved, and opened to him, yet his Lordship would not hear any proofs read, but dismissed the bill.

Again, in *Plume v. Beale* (*g*), a bill was filed by the executor of Dr. *Plume*, to be relieved against a legacy of 100*l.* claimed by the defendant *Beale*, as given by the doctor's will. *Beale* was no relation to the doctor, nor had done him any service, except that she had occasionally, during his illness, brought him some few slight cordials, in return for which he had ordered her a piece of plate. The legacy was interlined in the will by a different hand, and supposed to have been done by the defendant herself, when she was left in the room alone with the corpse, in which room the will was left. But as the will was proved by the executor in a Court which had proper jurisdiction, the subject relating to personal estate only, and particularly as the executor might have proved the will in the Ecclesiastical Court, with a particular reservation as to the legacy, Lord *Cowper*, C., said, the

(*f*) 2 Vern. 8,

(*g*) 1 P. Wms. 388.

remedy of the executor must be in that Court, and dismissed the bill with costs.

As to the probate.

A Court of Equity cannot set aside a will of personal estate, the probate of which has been obtained in the Spiritual Court; that jurisdiction belongs to the latter as the Court of Probate. This principle was recognized by Lord Cowper, C., in *Plume v. Beale* (h); by Lord Hardwicke, C., in *Barnsby v. Powel* (i); and by Lord Eldon, C., in *Ex parte Fearon* (j). It was the ground of the decision in *Kerrick v. Bransby* (k), as reversed in the House of Lords, and in that of Lord Lyndhurst, C., in *Allen v. M'Pherson* (l), reversing the judgment of Lord Langdale, M. R. (m).

In the latter case the testator bequeathed a legacy to the plaintiff, and made S. E. his residuary legatee, executed several codicils, by which he gave to the plaintiff further legacies, and one-fourth share of his residuary estate. He afterwards executed another codicil (the ninth), by which he revoked all former bequests to the plaintiff, giving him a small annuity in lieu thereof, and at the same time made a reduction in legacies which he had previously given to some of the plaintiff's relations. The will and all the codicils having, after litigation in the Ecclesiastical Court, been admitted to probate, the plaintiff filed his bill, alleging that the testator had been induced to execute the last codicil solely through certain false and fraudulent representations which had been made against his (the plaintiff's) character, at the instance of S. E.; and that in the Ecclesiastical Court he had not been permitted to take any objections to that codicil, except such as went to the validity of the whole instrument, and praying therefore that the executors, or S. E., might be declared trustees for him to the amount of the bequests revoked by that codicil. To this bill the defendants demurred, and Lord Lyndhurst, C., after a review of the authorities held, reversing the decision of the Master of the Rolls, that on authority and principle the demurrer was proper, the Court having no jurisdiction to entertain the bill. This decision was confirmed on appeal by the House of Lords (n).

But although a Court of Equity cannot set aside a will of personal estate, the probate of which has been obtained from the Spiritual Court, yet the Court will interfere when a probate has

But the Court will interfere when the probate has been obtained by

(h) 1 P. Wms. 388.

(i) 1 Ves. sen. 119, 287.

(j) 5 Ves. 633, 647.

(k) 7 Bro. P. C. 437.

(l) 1 Phil. 133.

(m) 5 Beav. 469.

(n) 20th July, 1847.

As to the probate.

fraud to convert the wrong doer into a trustee.

been granted, by the fraud of the person obtaining it; and either convert the wrong doer into a *trustee* in respect of such probate, or oblige him to consent to a repeal or revocation of it, in the Court from which it was granted.

Thus, in *Barnesly v. Powell* (o), the bill sought to be relieved against a paper writing, purporting to be the will of the plaintiff's father, under which the defendant *Powel* claimed, and which was not without evidence to support it, although there was strong suspicion of forgery. It prayed also to be relieved against several acts of the plaintiff since his father's death, such as a decree of the Court of *Exchequer* against him, and a sentence in the *Prerogative* Court, wherein the plaintiff's consent, to establish that will by a probate, was obtained; and conveyances and assurances were made by him. Lord *Hardwicke*, C., directed an issue, with a special direction in the decretal order, to know upon what foundation the jury went, if they found against the will, whether upon forgery or any particular defect in the execution.

After a long trial by a special jury, a verdict was given against the will, with an indorsement that it was grounded upon forgery, and not upon any defect in the execution. Upon the equity reserved, Lord *Hardwicke* admitted that undoubtedly the jurisdiction of wills of personal estate belonged to the Ecclesiastical Court, according to which law it must be tried, notwithstanding the will is found forged by a jury at law, upon the examination of witnesses; but that there was a material difference between the Court of Chancery taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the Ecclesiastical Court by his fraud, not upon the testator, but the person disinherited thereby. That fraud in obtaining a will infected the whole; but the case of a will, of which the probate was obtained by fraud on the next of kin was of another consideration: that, in the case before him, the plaintiff had given a covenant to the defendant to do all acts which *Powel* should require of him; in consequence of which, a special proxy under hand and seal was obtained from him, confessing the allegations, upon which sentence was pronounced of probate to the defendants, the executors. The probate depended on that deed; and it was, therefore, proper for the Court to inquire, and set it aside for fraud, if proved; and that that was the ground of jurisdiction in the Court of Chancery, distinct

(o) 1 Ves. sen. 119, 284, 287; see also *Gingell v. Horne*, 9 Sim. 539.

from the will itself, and abstracted from the general jurisdiction of the Ecclesiastical Court, to determine of a will of personal estate. On the whole circumstances of the case, his Lordship decreed, that the defendants should consent, in the Ecclesiastical Court, the next Term, to a revocation of the probate; and that, after such revocation, the defendant should have a fortnight's time to propound the paper writing in the Ecclesiastical Court; on failure of which his Lordship said he would compel the defendants to consent to the granting administration to the plaintiff. His Lordship added, "I think I ought to go farther; and although I shall not yet decree a trust, yet even now shall be warranted to decree an account of the personal estate, to be paid into the Bank, for the benefit of the parties entitled, which for security was done in *Powis v. Andrews*; and the present case, from all the ill practice that has been, is stronger than that. This is the better method, to avoid any jealousy of infringing on the Ecclesiastical Court" (*p*).

As to the probate.

It being insisted for the plaintiff, that the Court ought to direct no examination of the said paper writing, but grant a perpetual injunction, from the circumstances of its being produced and found with the forged will, and its reciting a forged deed; his Lordship thought this would be a very good defence in the Ecclesiastical Court, as they were circumstances of suspicion; but that it would be going too far to say, that, because of ill practice in one will, he should have no right as to another.

So on the other hand, the Court of Equity will interfere and prevent a person from taking an undue advantage by contesting the validity of a probate, when such person *has acted under it*, and *admitted facts* material to its validity.

Equity will prevent a person taking advantage by contesting a will, after having admitted facts material to its validity.

Thus, in *Sheffield v. Buckinghamshire* (*q*), the bill was brought against the defendant for perpetual injunction to all further proceedings in the suit in the Prerogative Court, for controverting or calling in question the will and codicils of *John Duke of Buckinghamshire*, after the determination already and opinions given by the Court. Lord *Hardwicke*, C., granted the injunction on the ground of a series of admissions by the Duchess in previous proceedings in the Court of Chancery, in which she was defendant. Her Grace had admitted the will and codicil of the Duke to be in his handwriting, and had claimed legacies under them: the will had been proved in Court by witnesses examined on the part

(*p*) See also *Bransby v. Ker-ridge*, 1 Eq. Cas. Abr. 133.

(*q*) 1 Atk. 628; 3 Bro. P. C. 148.

As to the probate.

of the Duchess: personal estate had been laid out in purchases under the direction of the Court, and subsequent proceedings had taken place with the acquiescence of all parties. Upon the appeal by the Duchess, after the death of *Edmund Duke of Buckinghamshire*, her Grace had complained in the Court below of the construction, but not of the invalidity, or undue execution of the will or codicil. Upon the point, whether the question had been determined on proceedings in a proper Court, Lord *Hardwicke* expressed his opinion that, although it was true that the Court of Chancery, in an adversary way, could not determine the validity of a probate of a will or codicil, yet, if it came there on an incident in a cause, and that incident was admitted by the parties, the Court of Chancery or a Court of law might determine it, and hold the parties bound by the admission; and if either of the parties brought a new suit to contest that determination, the Court of Chancery would grant a perpetual injunction. That, what effectually gave the Court jurisdiction in that case was the trust declared in the will; and that every thing coming in by incident bound the parties; so that the jurisdiction of the Ecclesiastical Court was not impeached, but, on the contrary, was admitted (*r*); but from some collateral circumstances, the Court of Chancery did not think proper to suffer the party to apply and take the benefit of that jurisdiction. His Lordship observed, that he should not have made the injunction perpetual, if there had appeared any new material facts and evidence since the last hearing; but there were none. The injunction was accordingly against the Duchess, from proceeding in the Prerogative Court of *Canterbury*, or in any other Ecclesiastical Court, in the suit already brought by her, or in any other suit, to call in question the will or codicil of the Duke, her late husband.

No appeal to the Lords from a sentence in the Ecclesiastical Court, confirmed by the delegates.

But no appeal lies to the Lords from a sentence in the Ecclesiastical Court, confirmed by the Delegates, pronouncing a testator to be *compos mentis*, who, after the sentence upon an issue at law, was so found (*s*).

The accuracy of the probate is generally relied upon as containing an exact and verbatim copy of the original will; but in some cases the Court of Chancery has sent for and examined the original will, and has been influenced by it in determining a question of construction. This occurred in *Compton v. Bloxham* (*t*),

(*r*) See *Parker v. Ash*, 1 Vern. 256, where legacies were erased, as it was supposed by the testator; and the will was admitted as though no

such erasures had been made.

(*s*) 3 Atk. 546.

(*t*) 2 Coll. (C.), 201.

in which the punctuation of the original appears to have thrown light upon the construction.

As to the recovery of legacies.

SECT. II. Of the jurisdiction of Courts in regard to the *recovery* of the legacy.—And,

First, with respect to the *Ecclesiastical* Courts.

1. In the Ecclesiastical Courts.

The jurisdiction of the Ecclesiastical Courts is confined to testaments merely, or in other words to dispositions of personalty: if, therefore, real estate be the subject of a devise to be sold for payment of debts, or portions, these Courts cannot hold plea in relation to such disposition.

Accordingly, in *Paschall v. Keterich* (*u*), it is said to have been the opinion of all the Justices of each Bench, where a man devised that his executor should sell his lands, and his daughter have a portion of the money for her advancement, and so of other things a sum certain, and died, and his executors made sale, and would not pay the legacies, upon which the daughter sued execution in the Spiritual Court, that the prohibition was well laid in such a case, because it was not a legacy testamentary, but out of land, by reason of the will, in the performance of which the Ecclesiastical Court had no concern.

In *Witter v. Witter* (*v*), an executor was declared a trustee of the leasehold for lives for the benefit of the next of kin of an infant, upon whose death a question arose, whether the heir or next of kin were entitled to the lease. Lord Chancellor *King*, observing, that though the Spiritual Court could not intermeddle with a freehold to distribute it, yet it did not follow but that the Court of Equity might enforce such a distribution.

But, though the jurisdiction of the Ecclesiastical Courts does not extend to real estate, yet it affects interests arising out of real property, when such interests are less than freehold, as in bequests of terms for years, or of rents payable out of them, such dispositions relating to *chattels real* only.

In *Rumney v. Rosse* (*w*), a prohibition was prayed to the Ecclesiastical Court upon a bequest of a rent out of a term after sentence; but the Court denied it, as the subject was a mere testamentary legacy, and no more than a bequest of so much money out of the testator's goods, which was a direction only

(*u*) Dyer, 151, *b*; also *Desbunnet v. Ferbanke*, Palm. 120, *S. P.*

(*v*) 3 P. Wms. 99, 101.
(*w*) 2 Keb. 8, pl. 22.

As to the recovery of legacies.

In the Ecclesiastical Courts.

how it should be paid; that the rent was a chattel, and went to executors.

Again, in *Love v. Naplesden* (x), *R. Rent*, being seised in fee of lands, and possessed of a lease for years of other lands, devised all his lands and leases to *Thomas* his son and heir, whom he made executor, except 20*l.* per annum for seven years to be employed in this manner; 100*l.* to his daughter *Elizabeth*, to be paid within five years, and 30*l.* to his daughter *Mary*, to be paid in seven years. *Thomas* entered and appointed his wife *Mary*, (who afterwards married the defendant), executrix, whom *Mary*, the daughter, sued in the Ecclesiastical Court for the legacy of 30*l.* The executrix and her husband brought a prohibition, surmising, that, the legacy being out of the profits of land, no suit could lie for it in the Ecclesiastical Court. But, as this was a mere personal legacy, and having been raised out of the lease for years, as well as out of the freehold, and *Thomas* having raised it, and died without payment as there was no remedy at common law by account or otherwise, it was reasonable the daughter should have her remedy in the Spiritual Court: whereupon a consultation was awarded by all the Justices, except *Williams*, who doubted of it.

In temporal matters Spiritual Courts bound by rules of common law.

In those cases, where the Spiritual Courts have jurisdiction, if a temporal matter be pleaded in bar of the relief, they must proceed according to the rules of the common law, or they will be prohibited from proceeding. If, therefore, payment were pleaded in a suit for a legacy, and there was but one witness, whose evidence the Ecclesiastical Judge would not deem sufficient, merely because the rule of their law required *two*, a prohibition would be granted by the Temporal Courts (y).

2. In the Court of Chancery.

Secondly, with respect to the Court of *Chancery*.

If an instrument is testamentary a Court of Equity cannot act upon it unless proved in the Ecclesiastical Court (z). But a bill may be brought for discovery of assets before the will is proved, or while it is the subject of litigation in the Spiritual Court (a).

It does not appear that the Ecclesiastical Courts have in any

(x) Cro. J. 279; see also Bulst. (C.), 569.
153; Brownl. & Gold. Rep. 34.

(y) 3 Bla. Com. 112.

(z) *Consett v. Bell*, 1 Yo. & Coll.

(a) *Dulwich Coll. v. Johnson*, 2 Vern. 49; *Phipps v. Steward*, 1 Atk.

285.

instance exclusive jurisdiction in the recovery of a legacy; but wherever a legacy is recoverable in those Courts, it is also recoverable in the Courts of Equity.

As to the recovery of legacies.

Thus, in *Pamplin v. Green* (b), a bill was brought against an administrator for a distribution of an intestate's estate. The defendant pleaded, that the ordinary, by the Statute of Distributions, was made the Judge to distribute, and appointed to take security; and, therefore, that the plaintiff ought to sue there; but the plea was overruled, and the defendant ordered to answer.

In the Court of Chancery.

Although the administrator's accounts be passed in the Spiritual Court, and a distribution be there decreed, yet the Court of Chancery will decree an account of the whole estate, without regard to the proceedings there.

Thus in *Bissel v. Artell* (c), the widow in the Spiritual Court set up a *procurator* for her children, the infants, and got her account passed there, and each child's proportion ascertained, and distribution decreed; and, on giving new security, got the old security discharged. The Court of Chancery, without regard to the proceedings of the Spiritual Court, decreed an account of the whole estate.

Though, it should seem, in general, that where the Spiritual Court is first possessed of a cause, in which it has concurrent jurisdiction with the Court of Chancery, the latter Court will not intermeddle (d).

The Court of Chancery, in exercising its concurrent jurisdiction as to distribution, is concluded by the sentence of the Spiritual Court in granting administration; and is not at liberty to re-examine the points decided in the exercise of that peculiar jurisdiction (e).

Suits for legacies, however, are now rarely instituted in the Ecclesiastical Courts (f), on account of their not possessing adequate jurisdiction to afford complete relief in by far the greater proportion of cases.

(b) 2 Ch. Ca. 95.

(c) 2 Vern. 47.

(d) *Nicholas v. Nicholas*, Pre. Ch. 546, and see *Horrell v. Waldron*, 1 Vern. 27; *Reynish v. Martin*, 3 Atk. 333.

(e) Hargr. Law Tracts, p. 473, and *Barrs v. Jackson*, 1 Phil. 582, and *Bouchier v. Taylor*, 4 Bro. P. C.

708, stated *infra*.

(f) 5 Mad. 357. A recent instance will be found in *Clarke v. Douce*, 2 Phil. 335; see also *Butter v. Robson*, 3 Phill. (Arches), 368; *Norris v. Hemingway*, 1 Hag. (Arches), 4 *Grignion v. Grignion*, Ib. 535.

As to the recovery of legacies.

In the Court of Chancery.

The Court of Chancery, as before observed, possesses in many cases jurisdiction, in exclusion of the Ecclesiastical Courts: in some, where the interests of the legatees fall under its peculiar cognizance, as in instances of legacies to married women or infants; in others, where the bequest of the legacy involves the execution of trusts, either expressed or by the construction or implication of the Court; or where the trusts themselves are to be pointed out by the Court; in others, again, where the assets are equitable and to be administered in Equity, or where the remedy itself can only be enforced under the peculiar process of the Court of Chancery, as where a full discovery of assets is required. In all these, and similar cases, the Court of Chancery has, of course, the power of granting injunctions, in order to protect its own exclusive jurisdiction (*g*).

Instances of equitable jurisdiction.

We add a few cases illustrative of the last observations.

Thus, where a legacy is given to a married woman: as in the case of *Meals v. Meals* (*h*), where a married woman being entitled to a legacy under the will of her aunt, and the executor refusing to pay it to the husband, the latter instituted a suit in the Ecclesiastical Court for the legacy; the wife filed her bill for an injunction to stay her husband from proceeding in the Spiritual Court; which was granted, he not having made any settlement upon or provision for her. In the preceding instance, the Ecclesiastical Court has no power to compel the husband to make the proper settlement upon his wife.

Another instance is the case of a legacy to *infants*; in whose behalf Equity will interfere to protect their interests, and to give proper directions for securing and improving the fund for their benefit; and which cannot be effected in the Ecclesiastical Court.

Thus, in *Horrell v. Waldron* (*i*), the testator bequeathed to the three children of *W. Waldron* 200*l.* to be paid within a year after his death. The executor stated in his bill, that the children were infants; that the testator died about a year ago, and that the plaintiff was desirous to pay the 200*l.* on being indemnified. He complained, that the father sued him in the Ecclesiastical Court to enforce payment of the legacy, without giving him any security against the children; and the plaintiff insisted he could

(*g*) *Smith v. Kempson*, 2 Dick. 769; 1 Atk. 516; *Hill v. Turner*; *Nicholas v. Nicholas*, *ubi supra*; *Petit v. Smith*, 1 P. Wms. 7; *Hatton v. Hatton*, 2 Strange, 864; 5 Mod. 275.

(*h*) 1 Dick. 373; also 1 Atk. 491, 516; 2 Atk. 420; Pre. Ch. 548, *S. P.*

(*i*) 1 Vern. 26; see also *Nicholas v. Nicholas*, Pre. Ch. 546.

not be indemnified, but by a decree in Equity, where care would be taken to secure the money for the children, and for the plaintiff's discharge. The defendant demurred, because the demand being for a legacy, was a subject properly cognizable in the Ecclesiastical Court. But the Lord Chancellor declared, that the suit was proper in Equity; and that if the matter had proceeded to a sentence in the Ecclesiastical Court, it was proper to resort to Equity for the executor's indemnity, where the legatees were to give security to refund, but not in the Spiritual Court: that Equity would see the money put out for the children. His Lordship overruled the demurrer.

As to the recovery of legacies.

In the Court of Chancery.

Again, in legacies upon trust.

Where a sum of money is given to a *trustee*, upon trust for a legatee, and he sues for payment into his own hands (*j*), the Court will grant an injunction to stay the proceedings in the Spiritual Court, as the latter Court has no jurisdiction in matters of trust.

In a case of implied or presumptive trust, where the testator makes no disposition of the residue of his personal estate, and the executor by the construction of the Court of Chancery is trustee for the next of kin, the Ecclesiastical Court, having only power to compel a distribution when the party dies intestate (*k*), cannot decree the executor to make a distribution of the residue among the next of kin, that duty involving the discharge of a trust.

Thus, in *Petit v. Smith* (*l*) the testator, having a daughter and two sons, gave his sons 5*l*. a piece, and appointed them executors, but made no disposition of the surplus. On the death of the testator, the daughter, as next of kin, libelled in the Spiritual Court against the executors, to have the residue of the personal estate. The daughter recovered a sentence in the Spiritual Court, from which there was an appeal to the Delegates, and a prohibition to the Delegates was granted: from which the daughter appealed, and filed her bill in Chancery against the executors for an account. Distribution was decreed.

Again, in *Hatton v. Hatton* (*m*), a prohibition to the Prerogative Court was moved for in a suit there instituted by the next of kin against the executor to make distribution of the surplus, there being a specific legacy to the executor, on the ground of

(*j*) 1 Atk. 516, per Lord Hardwicke, C.; also *Nicholas v. Nicholas*, Pre.Ch. 546.

(*k*) Comb. 378; 1 Raymond Rep. 86; *Hutton v. Hatton*, 2 Stra. 865.

(*l*) 1 P. Wms. 6, S. P.; Comb. 378, and see *Farrington v. Knightly*, 1 P. Wms. 544.

(*m*) *Ubi supra*.

As to the recovery of legacies.

In the Court of Chancery.

his being a trustee thereof for the next of kin; and it was insisted that the Spiritual Court could only decree distribution in case of intestacy: the prohibition was granted.

Another instance of trust is, where a sum of money is given to a trustee in trust for charitable purposes; as the mode of distribution devolves upon the Court of Chancery, a suit in that Court is the proper course for the recovery of the bequest (*n*): and where the legacy is given to trustees for the poor of a parish, they may file a bill for the payment of the legacy, an information by the Attorney General being in such case not necessary (*o*). For instances of this branch of equitable jurisdiction, the reader is referred to Chapter XIX. on the subject of legacies to charitable uses.

In the case of *Barker v. May* (*p*), real estate was devised to executors in trust, to sell the proceeds to form part of the personal estate. At the suit of a legatee a citation issued from the Consistorial Court of *Norwich*, against the executor for an account, who accounted for the personal estate, but contended that he was not liable to account for the money produced by sale of the realty, that not being part of the testator's personal estate. Upon the legatee's proceeding to enforce payment in the Ecclesiastical Court, the Court of King's Bench at the instance of the executor, granted a prohibition on the ground that the assets were equitable and must be sued for in Equity, the Ecclesiastical Court not having jurisdiction in that case.

We may close the present section with observing, that, notwithstanding the general rule of Equity not to allow a suit against an executor before probate (*q*), yet, under peculiar circumstances arising from the misconduct of the executor, or for the protection of the property, it will entertain the suits of those interested under the will, against the executor, before probate.

In the case of *Tucker v. Phipps* (*r*), Lord *Hardwicke* says, upon the subject of spoliation, as to a personal legacy, where the will is destroyed or concealed by the executor, if the spoliation were plainly proved (though the general rule was to cite the executor into the Ecclesiastical Court), the legatee might properly come to a Court of Equity for a decree upon the head of spoliation and suppression. There were several cases, where, if spoliation or oppression were proved, it would change the juris-

(*n*) *Att. Gen. v. Pyle*, 1 Atk. 435.

(*o*) 2 Yo. & Jerv. Exch. Rep. 60;
Mavor v. Nixon.

(*p*) 9 Barn. & Cress. 489.

(*q*) 3 Atk. 359.

(*r*) *Ib*.

diction, and give the Court of Equity jurisdiction, which it had not originally (*s*).

As to the recovery of legacies.

So, where a litigation for probate is pending in the Spiritual Court, though administration *pendente lite* may be obtained in the Ecclesiastical Court, yet the Court of Equity may, in the exercise of its jurisdiction, in case of fraud, appoint a receiver, for the purpose of preventing the destruction of the property of the testator (*t*).

In the Courts of Chancery.

After probate, also, a receiver will be appointed in case of the misconduct of the executor, or his misapplication of the assets (*u*), or of his bankruptcy or insolvency (*v*); or in the case of the husband of a feme covert, sole-executrix, being beyond sea (*w*); but the mean circumstances or poverty of the executor will not be a sufficient ground for such appointment of a receiver (*x*).

In *Newton v. Richetts* (*xx*), Lord Cottenham, C., held, that the circumstance of a suit pending in the Ecclesiastical Court to recal probate, is not of itself a sufficient ground for the Court of Chancery to interfere with the disposal of the testator's property by the executors, by granting an injunction and receiver.

Thirdly, with respect to the Courts of Common Law.

No action at law lies to enforce the payment of a general legacy; for if it did, no terms could be imposed on the party who was entitled to recover: so that, when the legacy is given to a wife, the husband might recover at law, and no provision could be made for the wife or family, which in a Court of Equity would be enforced. Upon the grounds, therefore, of convenience and justice, the Courts of Common Law have refused their interference.

3. In the Courts of Common Law.

Early (*y*) as well as more recent (*z*) cases, however, have occurred, wherein Courts of Common Law have assumed jurisdiction in testamentary matters, entertaining actions instituted for the recovery of general legacies, upon proof of an express *assumpsit*, or undertaking by the executor to pay them. But

(*s*) Hob. 109.

ard v. Papera, 1 Mad. 142.

(*t*) *Atkinson v. Henshaw*, 2 Ves. & Bea. 85, and *Ball v. Oliver*, Ib. 96; *Rutherford v. Douglas*, 1 Sim. & Stu. 111.

(*xx*) 11 Jurist, 662.

(*u*) Anonymous, 12 Ves. 5.

(*v*) *Gladdon v. Stoneman*, 1 Mad. 143, note; *Middleton v. Dodswell*, 13 Ves. 266.

(*y*) *Nicholson v. Shirman*, Sid. 45; *Ewer v. Jones*, Holt's Rep. 419; *Henly v. Welsh*, 11 Mod. 89, 91, per Holt, *arguendo*; *Davis v. Wright*, Ventr. 120; *Davis v. Reyner*, 1 Lev. 2nd part, p. 3.

(*w*) *Taylor v. Allen*, 2 Atk. 212.

(*z*) *Atkins v. Hill*, Cowp. 284; *Hawkes & Ux. v. Saunders*, Ib. 289.

(*x*) Anonymous, 12 Ves. 4; *How-*

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these cases have been overruled by later determinations: an action at law being now only maintainable against the executor for a *specific* legacy, after *assent* given.

The case which is considered to have overruled the cases before alluded to, is *Deeks v. Strutt* (a). There an action of assumpsit was brought against the executor, for the arrears of an annuity bequeathed to the wife of the plaintiff. The executor never made any express promise to pay; but the assets were sufficient to satisfy the plaintiff's demand. It was contended for the plaintiff, that where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever made; and for this the case of *Hawkes v. Saunders* (b), was cited. But the Court decided that the action could not be maintained; for that policy and convenience were against the jurisdiction of the Courts of Common Law over the subject in question; that a Court of Law could not impose any terms on the party suing; if he be entitled to a verdict, the law must take its course: but that a Court of Equity would impose on the party applying such terms as they thought right and according to conscience. *Grose, J.*, observed, "There is one case in the Books (c), where the declaration states, that in consideration of a forbearance by the plaintiff to sue, the executor promised to pay the legacy, and the Court held that the action might be maintained; but the circumstance of that action, being brought on a promise in consideration of forbearance, shows that it was understood, that the bare possession of assets was not alone sufficient. This is a novel attempt: and I am of opinion that the action cannot be supported."

In *Johnson v. Johnson* (d), Lord *Alvanley*, Chief Justice of the Court of Common Pleas, observed, that "if an executor thinking that he had settled the affairs of his testator, pay the legacies, he had no difficulty in saying, that a Court of Common Law would not entertain an action for money had and received against a legatee, since such Court could not take into consideration, as a Court of Equity would do, the mode in which the funds might have been applied" (e).

In the case of *Jones v. Tanner* (f), an action of assumpsit was brought for a distributive share of an intestate's personal estate against the executor of the administrator of the intestate; alleging promises by the executor: and it was decided that the action was not maintainable, it being against the wrong person and in the

(a) 5 T. R. 690.

(b) Cowp. 289.

(c) *Davis v. Wright*, 1 Vent. 120, and *Smith v. Johns*, Cro. Jac. 257.

(d) 3 Bos. & Pul. 169.

(e) See also *Nicholson v. Shirman*, Sir T. Raym. Rep. 23; Sid. 45, S. C.

(f) 7 Bar. & Cress. 542.

wrong Court. An attempt was made in the argument to distinguish the principal case from *Deeks v. Strutt* (g), inasmuch as in the latter, the promise was *implied*, in the principal case *express*; but the distinction was denied, *Littledale*, J., observing, that the judgment of Lord *Kenyon*, C. J., did not proceed upon the distinction, and had always been considered as an unqualified decision that an action at law could not be maintained for a legacy.

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But if a legatee alters the nature of his demand, and changes it into a debt or duty, as by accepting a bond from the executor for payment of the legacy, it seems that the effect of the transaction will be, either to deprive the Ecclesiastical Court of its jurisdiction, or to give an option to the person entitled, to sue in that, or in a temporal Court at his discretion.

Where legatee alters the nature of his demand, and accepts a bond.

Thus in *Gardner's* case (h), the executors gave a bond to one of the legatees of the testator, for payment of the legacy. *Doddridge*, J., held, that the obligee might sue for the legacy in the Ecclesiastical Court, or at Common Law upon the bond; observing, that the acceptance of the bond for payment of the legacy, had not totally destroyed the nature of it.

So in the case of *Goodwyn v. Goodwyn* (i), a man bequeathed 20*l.* to his daughter. The executor entered into a bond of 40*l.* to the daughter, for payment of the legacy according to the will. The daughter married, and her husband sued the executor in the Spiritual Court as for a legacy. The executor pleaded payment according to the bond: and because the Ecclesiastical Judge would not allow the plea, the executor brought a prohibition surmising the above facts. A consultation was moved for, because the suit was for a legacy; and it was urged that, although the executor pleaded payment, which was not allowed in the Spiritual Court, yet he ought not to have a prohibition, because payment was a good plea there, and if the Judge would not allow it, the party might appeal to the superior Judge; and that if a prohibition should be suffered to go in this case, the Spiritual Court would try nothing. But it was held by *Gawdy*, *Fenner*, and *Yelverton*, J.'s, that the surmise was good; for the executor, by his entering into a bond to the daughter for payment of the legacy, had extinguished the legacy, and had made the 20*l.* given by the will a debt merely at common law, and not suable in the Ecclesiastical Court.

But although, as we before observed, no action at law lies

(g) *Ubi supra*.

(h) 2 Roll. Rep. 160.

(i) Yelv. 39, and see *Cuband v.*

Dewsbury, 8 Mod. 327, wherein *Gardner's* case is denied to be law.

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against the executor for a recovery of a *general* legacy, yet, if the legacy be *specific*, whether of a chattel real or personal, and the executor has *assented* to the bequest, the legal interest vests absolutely in the legatee (*j*), and the action lies against the executor for the recovery of the specific chattel bequeathed.

In *Chamberlain v. Chamberlain* (*k*), *Thomas Chamberlain* made his wife executrix, and bequeathed a lease to her for life; remainder to his son for life; remainder to *his* first son and his heirs male. The wife assented, and died, having made *Croft* her executor. There being a deficiency of assets, a question arose, if *Croft* could sell the lease: and Lord Keeper *Finch* declared he should, notwithstanding the assent. But that if, after such assent, *J. Chamberlain* the son had sold the lease to a third person *bonâ fide*, this had defeated the creditors; for this had been a good title at law, and the purchaser should not be defeated by this trust for creditors: the Lord Keeper thereby admitting, that by the assent of the executrix, the term vested in the legatee.

In *Bastard v. Stukely* (*l*), one bequeathed goods to *A.* and *B.*, the executor *assented* to the legacy, and afterwards *A.* died; and the executor of *A.* sued in the Spiritual Court for *A.*'s share; there being no survivorship in such case by the laws ecclesiastical. A prohibition was granted upon demurrer and argument: for, by the assent of the executor, the interest was vested in the legatees, and became a chattel governable by the rules of the common law.

In *Young v. Holmes* (*m*), lessee for years bequeathed the term to *John Holmes* his executor for life, paying 50*l.* to *J. S.* remainder over to the lessors of the plaintiff. The executor died, and his executrix entered for the residue of the term, and possessed herself of the lease. It was contended and admitted by Lord *Parker*, C. J., that *Holmes* took the lease as executor and not legatee, and that the remainder was not executed, and that proof of special assent was necessary; which being proved by payment of the 50*l.* charged upon the term, verdict was given for the plaintiff.

In *Doe v. Guy* (*n*), in ejectment for a leasehold house and premises in *Grosvenor-street*, in the parish, &c. it appeared that the lessor of the plaintiff claimed the premises in question under a bequest of the lease thereof from *Mary Guy*, to whom the defendant was executor; that soon after the death of the testatrix, which was in *January*, 1802, upon Lord *Say* and *Sele*'s applica-

(*j*) *Paramour v. Yarlley*, Plowd. Rep. 539; 4 Co. 28.

(*k*) 1 Cha. Ca. 256, cited 3 East, 125, per Lawrence, J.

(*l*) 1 Lev. 2, part 209.

(*m*) 1 Strange, 69.

(*n*) 3 East, 120.

tion to the defendant to deliver up the possession of the house, he returned for answer by letter, that it was not convenient to him to remove before *Michaelmas* then next, at which period, but not before, he was willing to resign it. By a subsequent letter, the defendant informed the lessor, that he was ready to resign the house on the 25th of *April*. This was ruled by Lord *Ellenborough*, C. J., at the trial, at the sittings at *Westminster*, to be evidence of the defendant's assent as executor to the bequest. But it being contended further, upon the authority of *Deeks v. Strutt* (o), that no action at law would lie to recover a legacy, which was in substance the case here, a verdict passed for the plaintiff, with liberty for the defendant to move the Court to set it aside, and enter a nonsuit. A rule *nisi* was accordingly obtained for this purpose. The rule was dismissed in the following term: Lord *Ellenborough*, C. J., in the course of his judgment observing, "The question of a specific legacy assented to by the executor was not before the Court in *Deeks v. Strutt*, but whether the law would raise an *implied* promise on proof of an acknowledgment of assets by the executor, so as to sustain an action against him for an annuity, payable out of the general funds of the testator. But it never could be doubted, but that at law the interest in any specific thing bequeathed vests in the legatee upon the assent of the executor. If it should afterwards appear that there is a deficiency of assets to pay creditors, the Court of Chancery will interfere, and make the legatee refund in the proportion required. It makes no difference, whether the bequest be of a personal, or real chattel; but according to the doctrine laid down in the cases cited of *Paramour v. Yardly*, and *Young v. Holmes* (p), and the passage from 4 Rep. 28, the assent of the executor once given to a specific legacy, vests the interest at law irrevocably; and this is not broken in upon by any subsequent case. Now here was ample evidence of an express assent by the executor; for he appointed a certain day for giving up the possession of the house to the lessor of the plaintiff; and therefore the latter is entitled to recover." *Lawrence*, J., after citing *Duppa v. Mayo* (q), *Saunders's case* (r), *Chamberlain v. Chamberlain*, and *Bastard v. Stukely* (s), continued, "But *Barton's case* (t), which came on to be argued on a demurrer to the prohibition, appears to distinguish between the case of a *general* and *specific* legacy; inasmuch as it appeared by the

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(o) *Supra*.

(p) Plowd. Rep. 539; 1 Stra. 70.

(q) 1 Saund. 278.

(r) 5 Rep. 12, b.

(s) *Ubi supra*.

(t) Freem. K. B. & C. P. Rep. 289.

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suggestion that the executors had consented to take as legatees; and by this mean, the property vested in them as legatees, and was *altered* from what it was when they were executors; for when they were executors, one might have granted away *all* the goods, but after taking as legatees, one could grant but a *moiety*: and it is added, when a certain thing, as a horse, or cow, is devised, as soon as the executor assents, the property vests in the legatee, and he may have *an action at common law for recovery of the thing*; and therefore differs from the case in 2 Roll. Abr. 301, for that was for a legacy for which the common law gives no remedy. That must be understood to mean *a legacy payable out of the general funds of the testator, in contradistinction to a legacy of a specific thing.*" *Le Blanc, J.*, said; "It is admitted, that, upon the old authorities, there is no doubt of the plaintiff's right to recover, unless they have been overruled by the case of *Deeks v. Strutt*. But that never could have been in the contemplation of the Judges there; because it formed a ground of objection with them to the action, that it was a novel attempt, to contend that the law would raise an implied assumpsit against an executor, merely from the possession of the assets. They thought that it would not: and, in discussing that point, they shewed the inconvenience which would result from extending the law in that respect further, than it had been carried before."

In *Williams v. Lee (u)*, a specific legacy having been bequeathed to the defendant, who applied to the plaintiff (the executor), and who assented to the legacy, but delayed to deliver it, the defendant brought an action of *trover* for the legacy, consisting of several specific things mentioned in the will, and had a verdict and 200*l.* damages. The bill was filed, in order to set aside the verdict and judgment at law, as obtained against conscience. The defendant pleaded the verdict and judgment at law. Lord *Hardwicke, C.*, allowed the plea, observing in the course of his judgment, "It is very extraordinary if a legatee must in every instance bring a bill in this Court for the recovery of a legacy against an executor; for, though it is said by the plaintiff's counsel, that, after a testator's debts are paid, the residue vests in an executor, and the legatee is not entitled to it at law, yet after an executor has assented, an *action for trover* will certainly lie for a legacy" (*v*).

(u) 3 Atk. 223.

(v) See also *Cooper v. Thornton*, 3 Bro. C. C. 98, stated *supra*, p. 887.

Trover is founded in the property of the plaintiff, who must also have the right of possession as well as of property (*w*), both these rights must, therefore, concur in the legatee of the specific *personal* chattel, in order to entitle him to this species of remedy for the recovery of his legacy.

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In the instance of a specific real chattel, the cases before stated shew that where the action lies at law, ejectment is the proper remedy.

It was decided in the case of *Nicholson v. Sherman* (*x*), that an action *on the case* will not lie for a general legacy. The cases cited below (*y*) are early authorities, wherein it is stated, that an action of debt or on the case will lie for money *charged upon land*; but it would seem that the reasoning upon which the case of *Deeks v. Strutt* was decided, is equally applicable to those authorities, and would overrule them.

SECT. III. Of the jurisdiction of the Courts in the interpretation of testamentary dispositions.

A very few observations will suffice upon this subject. Each Court in which a legacy is recoverable must of course have the power of interpreting the effect of the gift in question; and in the administration of this branch of jurisprudence, it is of the utmost importance, with a view to uniformity of decision in all Courts taking cognizance of questions of property, that there should be well-established maxims in the interpretation of written instruments, as to the legal import and effect of technical expressions; and that such rules of construction, like other rules of property, should be recognised, and, as far as practicable, adopted by those Courts, whether in the exercise of their exclusive or concurrent jurisdiction.

As to the interpretation of testamentary dispositions.

The importance and necessity of this uniformity has been long felt and repeatedly insisted on by great authorities (*z*); and, indeed, does professedly, and in every case should practically regulate the determinations of Courts, having jurisdiction in questions of property. The well-known maxim of *Equitas sequitur legem* is founded upon this principle, and we accordingly find

In the Courts of Equity and Common Law.

(*w*) *Pyne v. Dor*, 1 T. R. 56; *James v. Semmens*, 2 H. Black, 213; *Gordon v. Harper*, 7 Ib. 9. 2 Lord Raym. 937; see also *Duppa*

(*x*) Sir Thomas Raym. Rep. 23; *v. Mayo*, 1 Saund. 278. Sid. 45, S. C.

(*y*) *Anonymous*, 6 Leach's Mod. Rep. 27, per Holt, Ib. 11, p. 91; *W. Blackstone's* arguments in *Perrin v. Blake*, Coll. Jurr. vol. 1, p. 283; *Ewer v. Jones*, Holt's Rep. 419; Harg. Jur. Exer. vol. 3, p. 387.

(*z*) See Mr. Justice *Yates* and Sir

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In the Courts of Equity and Common Law.

it governing the Courts of Equity in the construction of a large proportion of bequests of personalty, as well as of devises of real estate; and in which trusts are subjected to the same rules which govern legal estates.

The principle is further recognised in a practice of frequent recurrence, namely, that of sending a case out of Chancery for the opinion of the Judges of the Courts of Common Law. This continually happens in causes originating in the Court of Chancery, as coming under some one of its branches of peculiar jurisdiction, and in which a question of mere law arises; as, for instance, whether the words of the devise or bequest give a limited or an absolute interest in the subject of disposition. In such cases the Court refers the matter to the opinion of the Judges of the Courts of King's Bench or Common Pleas, upon a case stated for that purpose. This rests entirely with the discretion of the Court, which will not send a case to a Court of Law at the suggestion of the heir, if the construction is clear (a).

In unison with the anxiety of the Courts to preserve uniformity of decision in all questions of construction of wills, as in rules of property, we find it the practice, quite of course, for the Courts of Equity to refer to decisions in the Courts of Law upon the subject in question; and so, on the other hand, the decisions of Courts of Equity are held by the Courts of Common Law as binding authorities.

Instances in support of the preceding observations are so numerous, and of such frequent recurrence, that they may be found in almost every volume of printed reports. A reference, therefore, to particular cases illustrating the present subject, is in this place quite unnecessary: and, indeed, they will sufficiently appear in the detailed discussion of the cases in this Treatise.

In the Ecclesiastical Courts.

The preceding remarks upon the uniformity of decisions in questions of interpretation are, it is conceived, equally applicable to the Ecclesiastical Courts.

If, for instance, a legacy of 1,000*l.* be given to the testator's "next of kin," or to his "relations," and a suit were instituted in the Spiritual Court by a person claiming in the character of next of kin or relation of the testator, and it should so happen that there is no necessity for the legatee's proceeding in the Court of Chancery to avail himself of any of its branches of peculiar jurisdiction, it is presumed that the Spiritual Court would, in the interpretation of such legacy, be guided by the decisions of the

(a) *Muddle v. Fry*, *Mad. & Geld.* 270.

Courts of Chancery and Common Law upon the construction of a similar bequest (*b*), and would decree the payment of the legacy accordingly. Indeed, in the construction of legacies merely personal, Courts of Equity in general follow the rule of the Civil Law, because personal legacies are properly cognizable in the Ecclesiastical Court, and have considered themselves bound to follow the rules of that Court, to which the jurisdiction properly belonged; so that in all probability the construction of the Court of Equity would correspond with that of the Ecclesiastical Court, had the case supposed originally called for the interpretation of the latter (*c*).

In the interpretation of legacies.

In the Ecclesiastical Courts.

But were the case otherwise, although the Court of Arches must be considered as possessing original jurisdiction in all cases of legacy, yet the importance of uniformity in the construction of testamentary dispositions of personal property, as well as in devises of real estate, would, it is conceived, be acknowledged and acted upon by the Spiritual as well as by the Temporal Courts, it being of equal consequence to the community that rules of property should be uniformly established, whatever may happen to be the nature of the jurisdiction or form of procedure of the various Courts by which such questions are entertained.

In the case of *Hasting v. Hayne* (*d*), the construction given to a bequest by the Ecclesiastical Court was not followed by the Court of Chancery, Sir *L. Shadwell* observing, that he was not bound by the judgment of Sir *John Nicholl*, as he did not know that Sir *John* had before him the circumstances which were found in the Master's office.

But if the sentence of the Ecclesiastical Court, in a suit for administration, turns upon the question, which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in the Court of Equity between the same parties for distribution.

This was decided in *Barrs v. Jackson* (*e*): there a suit had been instituted in the Prerogative Court for administration to the estate of an intestate, *H. M. Smith. Jackson*, the defendant, claimed as second cousin, Mrs. *Barrs* claiming as her niece. The Ecclesiastical Court decided in favour of *Jackson*, and sentence was, that administration should be granted to him. A suit

(*b*) For decisions upon construction of bequests to relations and next of kin, see Chap. II. s. 5. 6.

(*c*) 3 Atk. 333; see pp. 553, 570, 649, 652.

(*d*) 6 Sim. 71, *supra*, 1684.

(*e*) 1 Phil. 582; 1 Yo. & Coll. (C.), 585; see also *Thomas v. Heteriche*, 1 Ves. sen. 333.

In the interpretation of legacies.

In the Ecclesiastical Courts.

was subsequently instituted in the Court of Chancery by Mrs. *Barrs*, claiming as niece and next of kin the residuary estate of the intestate. The question in issue was the sole question in the Ecclesiastical Court, and Sir *Knight Bruce*, V. C., not considering the decision of that Court conclusive, directed an issue, from which order *Jackson* appealed; and Lord *Cottenham*, C., decided, upon the authority of *Bouchier v. Taylor* (*f*), that the previous judgment of the Ecclesiastical Court was conclusive upon the question at issue, and allowed the appeal.

In the latter case (fully cited by Lord *Cottenham*, C., in *Barrs v. Jackson*), Dr. *Bouchier* claimed to be next of kin to *Ann Millington*, as her first cousin once removed: *Alice Merchant* claimed as her first cousin. A suit was instituted for administration in the Prerogative Court, and the decision was in favour of Dr. *Bouchier*. That decision turned solely on the question which of the two claimants was next of kin. Afterwards a suit was instituted in the Court of Chancery by a person claiming under the will of *Alice Merchant* as her residuary legatee; the defendant insisted on his title as next of kin, and the question was, whether the decision of the Ecclesiastical Court was conclusive. The suit in the Court of Chancery was not actually between the same parties as in the Ecclesiastical Court, but between one of the same parties and the person claiming under the other, and so in effect between the same parties. The cause came on before Lord Keeper *Henly*, and the sentence of the Ecclesiastical Court being insisted on, as a bar to the suit, it was ordered that the plea should stand for an answer, with liberty to except. Exceptions were accordingly taken, and upon the argument on those exceptions two points were raised; first, whether the sentence was conclusive; and secondly, if it was not, what was the effect of certain special circumstances which were also insisted on. The Lord Keeper directed an issue; and Lord *Bathurst*, C., on appeal, affirmed that decision, only varying the form of the issue. On appeal to the House of Lords, the decision of the Lord Chancellor was reversed, his Lordship being present as Chancellor, making no opposition, and Lord *Mansfield* being the only speaker on the subject.

(*f*) 4 Bro. P. C. 708.

ADDENDA.

The following Cases have been reported since the present Edition was in progress through the Press :

Page

- 59, note (b)—Add *Wordsworth v. Wood*, affirmed 4 Myl. & C. 641, and in D. P. 11 Jur. 593.
- 77 “ (s)—Add *In re Connor*, 2 J. & Lat. 456.
- 93 “ (l)—Add *Ware v. Rowland*, 11 Jur. 622.
- 96 “ (s)—Add *Goldie v. Greaves*, 14 Sim. 348.
- 100 To the cases in sect. iv. may be added *Farrant v. Nickols*, 15 Law J., N. S. 259.
- 124 “ (v)—*Smith v. Barneby*, affirmed 11 Jur. 619.
- 146 “ (n)—Add *Nightingale v. Goulburn*, 5 Hare, 484.
- 150 “ (x)—*Wilkinson v. Garrett*, reported 2 Coll. 643 ; and *Scott v. Moore*, reported 14 Sim. 35 ; see also *Say v. Creed*, 11 Jur. 603.
- 159 “ (x)—Add *Recabe v. Garwood*, 8 Beav. 579.
- 169 “ (r)—Add *Newbolt v. Pryce*, 14 Sim. 354.
- 189 “ (p)—Add *Yearwood v. Yearwood*, 10 Jur. 151.
- 203 “ (n)—Add *Prendergast v. Lushington*, 5 Hare, 171.
- 283 “ (r)—Add *Hudleston v. Gouldsbury*, 11 Jur. 464, in which Canal Shares were held not to pass under the word “ securities.”
- 299 “ (m)—Add 14 Sim. 400.
- 314 “ (z)—Add *Jacques v. Chambers*, 2 Coll. 435.
- 316 “ At the end of sect. v. add—“ It may here be noticed that where a testator gives to a legatee one or more out of several specific things, the legatee has an absolute right of selection.” *Jacques v. Chambers*, 2 Coll. 435. 441.

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- 319 note (m)—*Jones v. Jones*, since reported 5 Hare, 440.
- 844 ... In illustration of the qualification suggested in the third paragraph to the rule of ademption, by removal of goods from one place to another, the case of *Morris v. Morris*, 2 Coll. 719, may be referred to.
- 360 “ (j)—Add *Gervis v. Gervis*, 14 Sim. 654; also, 11 Jur. 578, in which Sir *L. Shadwell*, V. C., overruled his judgment in *Cornewall v. Cornewall*, 12 Sim. 128, and expressed his approbation of *Tombs v. Rock*, 2 Coll. 490.
- 368 “ (p)—Add *Sanford v. Sanford*, 11 Jur. 322, on the effect of a revocation (by a substituted bequest) of a legacy given over upon contingencies.
- 420 .. Third paragraph: the order in *Innes v. Mitchell* made by Lord *Lyndhurst*, C., by mistake printed *Cottenham*, has since been varied by Lord *Cottenham*, C., and, as it is conceived, upon the right principle, 2 Phill. 346.
- ~~529~~ “ (o)—Add *Collis v. Robins*, 11 Jur. 362.
- ~~557~~ “ (v)—Add *Josselyn v. Josselyn*, 9 Sim. 63, and *Saunders v. Vautier*, Cr. & Ph. 240.
- 587 “ (e)—Add *Cockrane v. Wiltshire*, 11 Jur. 426.
- 603 “ (k)—Add *Stone v. Harrison*, 2 Coll. 715.
- 625 “ (f)—Add *Butterworth v. Harvey*, 9 Beav. 130.
- 648 “ (m)—insert, ‘and see *Willis v. Douglas*, 11 Jur. 703.’
- “ (n)—Add *Scawin v. Watson*, 11 Jur. 293, affirmed ib. 576.
- 674 “ *Cross v. Kennington*, since reported, 9 Beav. 150.
- 679 “ (f)—Add *Evans v. Crosbie*, 11 Jur. 510.
- 708 “ (d)—Add *Collis v. Robins*, 11 Jur. 362, in addition to the authorities, ending with *Tower v. Rous*.
- 759 “ (j)—Add *Rishton v. Cobb*, affirmed 5 Myl. & Cr. 145.
- 803 “ (m)—*Green v. Green*, 2 J. & Lat. 529, may be referred to, where it was decided that the consent of a party to marriage, only applies to marriage during that party’s life.
- 864 “ (qq)—Add *Rocke v. Rocke*, 9 Beav. 66.
- 887 “ (b)—Add the wife’s equity extends to income as well as to principal, *Wilkinson v. Charlesworth*, 11 Jur. 644.
- 893 “ (a)—Add *Freeman v. Fairlie*, 11 Jur. 447, and *Gilchrist v. Cator*, ib. 448.
- “ (b)—Add, but see per Lord *Langdale*, M. R., in *Wilkinson v. Charlesworth*, 11 Jur. 645.
- 917 “ (t)—Add *Wall v. Wall*, 11 Jur. 403.

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- 919 note (w)—Add *Johnson v. Tucker*, 11 Jur. 466, which was upon the construction of a voluntary settlement similar to those adverted to in the text.
- 1110 “ (b)—Add *Lloyd v. Laver*, 14 Sim. 645, where through the invalidity of the appointment, the fund was ordered to be distributed equally among the objects of the power living at the death of the donee: the donee had appointed a life interest in the entire income of the fund to each of the objects in succession, the power directing an appointment of the *corpus* among all the objects.
- 1117 “ (c)—Add *Shrewsbury v. Hornby*, 5 Hare, 406, wherein a bequest for the assistance of Unitarian congregations was held valid.
- 1119 “ (i)—*Nightingale v. Goulburn* since reported, 5 Hare, 484.
- 1204 “ (j)—Add *Att. Gen. v. Glasgow College*, 2 Coll. 665.
- 1244 “ (p)—Add *Flint v. Warren*, 11 Jur. 665.
- 1370 .. To the cases discussed in Sect. II. div. 2, add *Willis v. Douglas*, 11 Jur. 703.
- 1382 “ (p)—Add *Wordsworth v. Wood* affirmed, 4 Myl. & C. 641, and in D. P., 11 Jur. 593.
- 1388 “ (f)—*Wordsworth v. Wood* affirmed, D. P. 11 Jur. 593. To the cases in the note *Wagstaff v. Crosby*, 2 Coll. 746, may be added; in which words of survivorship were referred to the death of the tenant for life, as the period of division; but as no one of the legatees survived that period the representatives of all were equally entitled to the funds, and not the representatives of the one who survived his co-legatees.
- 1395 “ To the class of cases cited in subdivision C. may be added *Bouverie v. Bouverie*, 2 Phil. 349.
- 1443 “ (1)—Add *Ward v. Biddles*, 11 Jur. 624.
- 1454 “ (v)—Add *Jordan v. Fortescue*, 11 Jur. 549.
- 1461 “ (t)—Add *Baker v. Baker*, 11 Jur. 585.
- 1516 “ (c)—Add *Say v. Creed*, 11 Jur. 603.
- 1790 “ (r)—Add *Wordsworth v. Wood*, 11 Jur. 593.
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CORRIGENDA.

- Page
- 4 line 8, *for* "Gardiner," *read* "Gardner."
- 27 At the end of the Table of Contents, Chap. II., Sect. XIX., *add*
5. When from the general ambiguity of the bequest the legatees cannot be ascertained.
- 43 note (n), *for* "Etlison," *read* "Ellison."
- 61 The title on the margin should be the same as that on p. 60.
- 63 line 15, from bottom *dele* 7.
- 66 line 21, at the commencement of the line *insert* 7.
- 124 note (v), line 2, *for* "Barnaby," *read* "Barneby."
- 203 note (p), *for* the words "in preceding page" *insert* "*ubi supra*."
- 265 note (c), *for* "Sutting," *read* "Jutting."
- 283 note (n), *for* "Tryer," *read* "Fryer."
- 292 line 11, *for* "A. or B." *read* "A. B."
- 373 note (w), *for* "Hunt," *read* "Hurst."
- 407 line 4 from bottom, *for* the words "the last case," *read* "Trimmer v. Bayne."
- 420 line 20, *for* "Cottenham" *read* "Lyndhurst."
- 470 line 14 from bottom, at the commencement *for* 2, *insert* 3.
- 471 line 18, *for* 3, *insert* 4.
- 499 line 3 from bottom, *for* "Kendall," *read* "Kennell."
- 500 note (z), *for* "Hallman," *read* "Hallum."
- 502 At the end of Table of Contents *add*,
6. When interest of legacy given for maintenance, &c., of legatee until 21, and then the principal for his benefit, at trustees' discretion.
- 587 line 5, *dele* "lastly."
- 647 In the margin of second paragraph, *insert*
6. When interest of legacy given for maintenance, &c. of legatee until 21, and then the principal for his benefit, at trustees' discretion.
- 749 line 3 from bottom, *after* "precedent," *add* "and subsequent."
- 763 line 6, *insert*, "of," *before* "the."
- 778 line 8, from bottom, *for* "Barker," *read* "Baker."
- 848 note (j), *for* "Stugges," *read* "Sturges."
- 898 line 4, from bottom, at the heading, *introduce* A.
- 908 note (j), *for* 38, *read* 28.
- 1012 line 15, *for* "leads," *read* "lead."
- 1023 line 22, *for* "legatees," *read* "legacies."
- note (i), line 2, *for* "Gurney," *read* "Gurrey."
- 1024 line 7, *for* "inclined it," *read* "inclined to think it."
- 1039 line 23, *for* "Sir K. Bruce, V. C." *read* "Lord Langdale, M. R."
- 1155 note (a) *after* "3 Geo. 4," *insert* "c. 72."
- 1177 line 14, *before* "is," *insert* "which."
- 1227 note (c), *for* "Holt," *read* "Mott."
- 1373 marginal note at the top, *under* "tenancy in common," *insert* "to two or more when they attain 21."
- 1395 margin, *opposite* third paragraph, *insert* "when confined to dying without leaving issue."
- 1415 last line, *for* "Lambe," *read* "Lomb."
- 1417 note (e), *for* "Pycroft," *read* "Rycroft."
- 1451 note (i), *for* "1 Phill. 493," *read* "aff. D. P., 21 July, 1847."
- 1456 note (b), *for* "Bladstone," *read* "Gladstone."
- 1463 margin, *opposite* second paragraph, *add* "1. Effect to be given to the whole will if possible."
- 1480 note (s), *for* "1 New Ch. Ca." *read* "1 Coll."
- 1483 note (i) and (l), *for* "Drew," *read* "Dru."
- 1564 line 1, last paragraph *for* (p) *read* (q).
- 1679 line 8, *for* "Plum," *read* "Flinn."
- 1782 note (a), last line, *for* "1 Turn." *read* "1 Turn. & R."
- 1783 note (d), a similar alteration.

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v. always follows the name of the Plaintiff.

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